TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 269. 51.

EDWARD H. CLARKE, PETITIONER,

vs.

WILBUR LARREMORE, TRUSTEE IN BANKRUPTCY OF RAYMOND W. KENNEY, BANKRUPT.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 3, 1902.

CERTIORARI AND RETURN FILED APRIL 28, 1902.

(23,065.)

(18,068.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 583.

EDWARD H. CLARKE, PETITIONER,

vs.

WILBUR LARREMORE, TRUSTEE IN BANKRUPTCY OF RAYMOND W. KENNEY, BANKRUPT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of RAYMOND W. KENNEY, a Bankrupt; EDWARD H. CLARKE, Petitioner.

Petition to Review Orders of the District Court of the United States for the Southern District of New York.

[Stamped:] United States circuit court of appeals. second circuit. Filed Oct. 26, 1900. William Parkin, clerk.

1 United States Circuit Court of Appeals, Second Circuit.

In the Matter of RAYMOND W. KENNEY, Bankrupt. In Bankruptcy.

SIRS: Take notice, that on the petition of Edward Howard Clarke, hereto annex-, I will apply to the United States circuit court of appeals for the second circuit, at a term thereof to be held at the court-room of said court in the United States post-office building, in the city of New York, borough of Manhattan, on the eighteenth day of December, 1899, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard for an order reversing and setting aside the orders described in said petition and for such other and further relief as may be just and proper.

Dated New York, December 5, 1899.

Yours, &c.,

GEORGE BELL,
Attorney for Petitioner.

Office and post-office address, 392 Broadway, borough of Manhattan, New York city, N. Y.

To Messrs. Spencer, Stickney & Ordway, attorneys for Wilbur Larremore, Esq., trustee for Raymond W. Kenney, bankrupt, 31 Nassau street, New York city, N. Y.; Philip J. Britt, Esq., attorney for Thos. J. Dunn, sheriff, 280 Broadway, New York city, N. Y.

2 United States Circuit Court of Appeals, Second Circuit.

In the Matter of RAYMOND W. KENNEY, Bankrupt. In Bankruptcy

To the honorable the judges of the United States circuit court of appeals for the second circuit:

The petition of Edward Howard Clarke respectfully shows to your honors as follows:

First.

That on the 13th day of April, 1899, an involuntary petition in bankruptcy of James McCreery & Company, the Automatic Fire Alarm Company and Frank Beltair was filed in the United States district court for the southern district of New York against Raymond W. Kenney, alleging substantially that the said Kenney was insolvent, and that on the 15th day of March, 1899, he had com-

mitted an act of bankruptcy in that he had suffered and permitted your petitioner to obtain a judgment against him while he was insolvent and thus to obtain a preference through legal proceedings, and not having at least five days before the sale or final disposition of the property affected by such preference vacated or discharged such preference. That process in said proceeding was duly served upon the said Kenney and he filed his answer to said petition denying the commission of the said act of bankruptcy. That thereafter such proceedings were had that on the 20th day of July, 1899, said court adjudicated the said Kenney a bankrupt.

Second.

That on the 23d day of January, 1899, petitioner was the owner and holder of certain promissory notes theretofore made by said Kenney to one Helen L. Kenney for a valuable consideration, and endorsed and transferred by the said Helen L. Kenney to your petitioner for a valuable consideration, and on said day your petitioner commenced an action in the supreme court of the State of New York, county of New York, upon said promissory notes by the service of a summons and notice upon the said Kenney, and thereafter on the 6th day of March, 1899, your petitioner caused to be entered judgment in said action against the said Kenney for the sum of $20,906.66, and on said day issued an execution thereunder and delivered the same to the sheriff of the county of New York.

Third.

That said sheriff duly levied said execution upon the stock of goods and fixtures situated in the premises No. 24 East Twenty-third street, in the city of New York, and on the 15th day of March, 1899, duly sold the same at public auction and realized therefrom the sum of $12,451.09.

Fourth.

That on the 13th day of April, 1899, the said petitioning creditors in bankruptcy having filed their said petition against said Kenney presented to the judge of said court of bankruptcy certain affidavits upon which the judge of said court issued an order directed to said sheriff and your petitioner, ordering them to show cause before said court why the sheriff should not be enjoined and restrained until the appointment of a trustee in said bankruptcy proceedings, or until the further order of the court from paying over any portion of the said proceeds in his hands as aforesaid to your petitioner, and why the applicants should not have such other relief in the premises as to the court might seem meet and enjoining and restraining the sheriff from paying over any portion of said proceeds to your petitioner until the hearing and decision of said motion and the entry of an order thereon, or until the further order of said court.

Fifth.

That thereafter your petitioner appeared in said court in obedience to said order to show cause by filing an affidavit of his attorney, George Bell, Esq., specially and solely for the purpose of opposing said injunction and for no other purpose whatever as appears from said affidavit.

Sixth.

That thereafter and on the 20th day of July, 1899, an order was made by said district judge upon the papers above mentioned and no others, enjoining the said sheriff from paying over the said money unto your petitioner or any other person except the trustee or trustees of the estate of said Kenney duly appointed, and enjoining your petitioner from receiving said sum or any part thereof until the further order of the court in the premises, and directing the said sheriff to pay over the said sum to the said trustee or trustees upon the appointment or qualification of said trustee.

Seventh.

That said order to show cause and said order last mentioned and each and every part thereof were erroneous, illegal and void and the said district judge was without jurisdiction and power to make
5 the same as your petitioner is advised by his counsel and believes, and your petitioner is aggrieved by said orders. And on or about the 3d day of August, 1899, your petitioner served upon the attorneys for the said petitioning creditors a petition of review praying this court to superintend and revise in matter of law the foregoing orders of the said district court, and to reverse the same. That said petition was not served upon a trustee for said Kenney because such trustee had not as yet qualified.

Eighth.

That thereafter Noah Davis, Esq., was duly elected and appointed trustee in bankruptcy for the said Raymond W. Kenney.

Ninth.

That thereafter and on the twenty-eighth day of August, 1899, your petitioner commenced a suit in equity in the circuit court of the United States for the southern district of New York against the said sheriff and against the said Noah Davis for the purpose of having it determined whether the money so made as aforesaid by the sheriff under execution belonged to your petitioner or to the said Noah Davis as trustee aforesaid, and to obtain a decree directing the said sheriff to pay over the said proceeds to your petitioner as a judgment creditor of the said Kenney. That said sheriff was duly served with a subpœna to answer in said suit, on August 30, 1899, but has never appeared or answered therein, and the same is still pending and undetermined.

Tenth.

That after the commencement of the said suit the said Noah Davis failed to qualify as trustee and thereafter, on the 26th day of September, 1899, Wilbur Larremore, Esq., was duly appointed trustee of the estate of said Kenney, bankrupt, and has duly accepted said appointment and duly qualified by giving bond, and is now the acting trustee of said Kenney.

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Eleventh.

That thereafter, on the 14th day of October, 1899, your petitioner served a notice of motion upon the said Larremore and upon the attorney for the said petitioning creditors for an order of the said district court directing a resettlement of the said order of July 20, 1899, by striking out that portion of the same which directed the sheriff to pay over the sum of money in his hands made by him under said execution to the trustee in bankruptcy of said Kenney.

Twelfth.

That on the 20th day of October, 1899, the said Wilbur Larremore served upon your petitioner and upon the said sheriff and upon the said bankrupt and upon the attorney for the said petitioning creditors a notice of motion in the said district court of the United States for the southern district of New York for an order that so much of the right under the judgment obtained by your petitioner against Kenney and the levy thereunder made by the said sheriff under the execution issued to him under said judgment as might be proper, be preserved for the benefit of the estate of said Kenney, bankrupt, and that the same pass to and be preserved by the trustee for the benefit of the said estate, and that the sheriff pay over forthwith said sum of money to said trustee.

Thirteenth.

That said motion made by your petitioner for resettlement and the said motion made by said trustee were heard together by the Honorable Addison Brown, judge of said district court, and although your petitioner objected to the jurisdiction of said court to hear and determine the said motion of the said trustee the said court overruled the said plea to the jurisdiction and decided that the motion of your petitioner for a resettlement should be denied and

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that the motion of the trustee should be in all respects granted, and an order to that effect was entered in said court on the 25th day of November, 1899, and a copy thereof and notice of entry was served on your petitioner on the 27th day of November, 1899.

Fourteenth.

That the said order and each and every part thereof so made as aforesaid was erroneous, illegal and void, and the said district court was without jurisdiction and power to make the same as your peti-

tioner is advised by his counsel and believes, and your petitioner is aggrieved by the said orders.

Wherefore, your petitioner prays your honors to superintend and revise in matter of law the foregoing rulings and orders of the United States district court, and to reverse the same and to grant unto your petitioner such other relief as may be just and equitable in the premises; and your petitioner further prays that inasmuch as all the papers upon which the order dated July 20, 1899, and the order to show cause, dated April 13, 1899, were based are included among the papers upon which the petition of the trustee aforesaid and the order dated November 25, 1899, were founded, that the said petition for review taken to the said order of July 20, 1899, may be heard and determined in conjunction with the present petition for review.

Dated New York city, December 5th, 1899.

EDWARD HOWARD CLARK, *Petitioner*,
By GEORGE BELL, *Att'y*.

GEORGE BELL,
Attorney for Petitioner.

Office and post-office address, 302 Broadway, borough of Manhattan New York city, N. Y.

8 STATE AND COUNTY OF NEW YORK, *ss*:

George Bell, being duly sworn, says: That he is the attorney for Edward Howard Clarke, the petitioner named in the foregoing petition, and that he has read the foregoing petition subscribed by him and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this verification is made by deponent is that Edward Howard Clarke is not at the county of New York, where deponent has his office, but is at Rockland, in the State of Maine.

GEORGE BELL.

Sworn to before me this 5th day of December, 1899.

C. L. WIEBE,
Notary Public, Kings Co.

Cert. filed in New York county.

(Endorsed:) U. S. circuit court of appeals. In the matter of Raymond W. Kenney, bankrupt. Petition and affidavit for review. George Bell, attorney for petitioner, No. 302 Broadway, borough of Manhattan, New York city. Service of a copy of the within petition and affd. is hereby admitted. Dated New York, Dec. 5, 1899. Philip J. Britt, att'y for sheriff. Stickney, Spencer & Ordway, att'ys for —. United States circuit court of appeals, second circuit. Filed Mar. 8, 1900. William Parkin, clerk.

9 United States Court of Appeals for the Second Circuit.

In the Matter of RAYMOND W. KENNEY, Bankrupt. In Bankruptcy.

SIR: Take notice, that on the petition of Edward Howard Clark, hereto annexed, I will apply to the United States court of appeals for the second circuit, at a term thereof to be held at the court-room of said court, in the United States Post-office building, in the city of New York, borough of Manhattan, on the 31st day of October, 1899, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order or judgment reversing and setting aside the orders described in said petition, and for such other and further relief as may be just and proper; and

Take notice further, that on the 7th day of August, 1899, at 2 o'clock p. m., I will apply to the Hon. E. Henry Lacombe, one of the judges of said United States circuit court of appeals, at said court-room, for an order staying proceedings upon the said orders above mentioned until the hearing and determination of said petition, or until the further order of the court, and for such other relief as may be just and proper.

Dated New York, August 3, 1899.

Yours, &c.,

GEORGE BELL,
Attorney for Petitioner.

Office and post-office address, 302 Broadway, New York city, New York.

To Eugene G. Kremer, Esq., attorney for James McCreery and others; Charles A. Kalish, Esq., attorney for Philipp Klein.

10 United States Circuit Court of Appeals, Second Circuit.

In the Matter of RAYMOND W. KENNEY, Bankrupt. In Bankruptcy.

To the honorable the judges of the United States circuit court of appeals for the second circuit:

The petition of Edward Howard Clarke respectfully shows to your honor- as follows:

First. That on the 13th day of April, 1899, an involuntary petition in bankruptcy of James McCreery & Co., the Automatic Fire Alarm Co, and James Beltair was filed in the United States district court for the southern district of New York, by their attorney of record, Eugene G. Kremer, Esq., against Raymond W. Kenney, alleging substantially, that the said Kenney was insolvent and that on the 15th day of March, 1899, he had committed an act of bankruptcy, in that he had suffered and permitted your petitioner to obtain a judgment against him while insolvent, and thus to obtain a preference through legal proceedings, and not having at least five days before the sale or final disposition of the property affected by such preference, vacated or discharged such preference. That process in said proceedings was duly served upon the said Kenney, and he

filed his answer to said petition denying the commissions of
11 the said act of bankruptcy; that on April 14, 1899, one Philip Klein, a creditor of said Kenney, filed a petition in said court joining in the original petition by his attorney of record Charles Kalish, Esq., and thereafter such proceedings were had, that on the 20th day of July, 1899, the judge of said court adjudicated the said Kenney a bankrupt. Copies of said petitions are hereto annexed and made a part hereof.

Second. That on the 23d day of January, 1899, petitioner was the owner and holder of certain promissory notes theretofore made by the said Kenney to one Helen L. Kenney for a valuable consideration and endorsed and transferred by the said Helen L. Kenney to your petitioner for a valuable consideration, and on said day, petitioner commenced an action in the supreme court of the State of New York, county of New York, to recover the contents of said promissory notes by the issuance of a summons and notice upon the said Kenney, and thereafter on the 6th day of March, 1899, your petitioner entered judgment in said action against the said Kenney for the sum of $20,906.66, and on said day issued an execution thereunder and delivered the same to the sheriff of the county of New York.

Third. That said sheriff duly levied said execution upon a stock of goods, wares and merchandise and fixtures situated in the premises No. 24 East Twenty-third street, in the city of New York, belonging to the said Kenney, and on the 15th day of March, 1899, duly sold the same at public auction and realized therefrom the sum of $12,451.09, and the same is now in his hands.

Fourth. That on the 13th day of April, 1899, the said original petitioning creditors aforesaid having filed their petition in bankruptcy against the said Kenney presented to the Hon. Addi-
12 son Brown, judge of said court, the affidavits of Hanford Crawford, Eugene G. Kremer, George I. Wooley and copies of affidavits of William B. Ellison and Thomas Wilmot Wood and the affidavit of William B. Ellison, which affidavits and copies of affidavits are hereto annexed and made part of this petition, and upon said affidavits, and no other papers, the said judge issued an order directed to said sheriff and your petitioner ordering them to show cause before said court why the sheriff should not be enjoined and restrained until the appointment of a trustee in the said bankruptcy proceedings or until the further order of the court, from paying over any portion of the said proceeds so in his hands, as aforesaid, to your petitioner, and why the applicants should not have such other relief in the premises as to the court might seem meet, and enjoining and restraining the sheriff from paying over any portion of said proceeds to your petitioner until the hearing and decision of said motion and the entry of an order thereon or until the further order of said court. A copy of said order to show cause is hereto annexed and made a part hereof.

Fifth. That thereafter your petitioner appeared in said court in obedience to said order to show cause by filing an affidavit of his attorney, George Bell, Esq., specially and solely for the purpose of

opposing said injunction and for no other purpose whatever, as appears from said affidavit, a copy of which is hereto annexed and made a part hereof. Said sheriff never appeared or answered in said proceedings.

Sixth. That thereafter and on the 20th day of July, 1899, a final order was made by the said district judge upon the papers above mentioned and no others, enjoining the said sheriff from paying over said money unto your petitioner, or any other person except a trustee or trustees of the estate of said Kenney, duly appointed herein,

13 and enjoining your petitioner from receiving said sum or any part thereof until the further order of the court in the premises, and directing the sheriff to pay over the said sum to the said trustee or trustees upon demand upon the appointment and qualification of said trustee. A copy of said order is hereto annexed and made a part hereof. Said trustee has not yet been appointed.

Seventh. That said order to show cause and final order and each and every part thereof so made as aforesaid were all and each of them erroneous, illegal and void, and the said district judge was without jurisdiction and power to make the same, as your petitioner is advised by his counsel and believes, and your peti-oner is aggrieved by said orders.

Wherefore, your petitioner prays your honors to superintend and revise in matter of law the foregoing rulings and orders of the United States district court and to reverse the same, and to grant unto your petitioner such other relief as may be just and equitable in the premises, and that inasmuch as a trustee will soon be appointed, and demand and obtain payment of said money before this petition for review can be decided, and said money thereby lost to your petitioner in the meantime and until the termination of this proceeding, the execution of said final order may be stayed.

EDWARD HOWARD CHASE,
By GEORGE BELL,
Att'y, 302 Broadway, N. Y. City.

S. LIVINGSTON SAMUELS, *Of Counsel.*

Office and P. O. address, 346 Broadway, New York city.

14 County of New York, *ss:*

George Bell, being duly sworn, deposes and says: That he is the attorney for Edward Howard Clark, the petitioner herein. That he has read the foregoing petition and knows the contents thereof, and the same *are* true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the reason that this verification is made by deponent and not by the petitioner is, that said petitioner is not within the county of New York in which deponent resides and has his residence, but is, as deponent is informed and believes, at the town of Rockland, Maine, where the petitioner resides.

GEORGE BELL.

Sworn to before me this 4th day of August, 1899.
BENJAMIN PATTERSON,
Notary Public, New York County.

[L. S.]

(Endorsed:) United States court of appeals for the second circuit. In the matter of Raymond W. Kenney, bankrupt. Petition, notice of motion & copy affidavit. Original. George Bell, att'y & counsellor, &c., 234 Broadway, N. Y. city. Service of a copy of the within is hereby admitted. Eugene G. Kremer. Dated N. Y., August 4, 1899. As circuit judge I have no jurisdiction. I know no powers residing in a judge competent to sit in the court of appeal- to make an order of that court except when specially authorized by statute or rule. As no appeal has been taken, the cause is still in the district court, and whatever power there may be to stay action must certainly rest with the district judge. Aug. 7, 1897. E. H. Lacombe, U. S. circuit judge. United States court of appeals, second circuit. Filed Apr. 3, 1900. William Parkin, clerk.

15 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, this 13th day of April, in the year of our Lord one thousand nine hundred and of the Independence of the said United States the one hundred and twenty-fourth.

[SEAL.] SAM'L H. LYMAN, *Clerk.*

16 U. S. District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt. No. 778.

Statement.

1899, Ap'l 13. Petition for adjudication as an involuntary bankrupt filed.
Ap'l 13. Subpœna served.
Ap'l 13. Order to show cause and preliminary injunction filed.
Ap'l 20. Answer denying bankruptcy filed.
June 12. Cause heard before Hon. Addison Brown, U. S. district judge.
June 12. Objections of bankrupt to adjudication filed.
June 15. Cause decided. Defendant adjudged bankrupt.
July 12. Order of adjudication with reference to Ernest Hall, referee, filed.

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1899, July 21. Order directing sheriff of New York county to pay to trustee of bankrupt money collected on execution in suit of Clark *vs.* Kenney, in New York supreme court, filed.

Aug. 15. Order staying sheriff from making said payment till decision on petition for review filed.

Oct. 20. Petition of Wilbur Larremore, trustee of bankrupt, that sheriff pay over said money filed.

Nov. 1. Plea of E. H. Clark, creditor of bankrupt, to the jurisdiction of district court filed.

Nov. 2. Consent of Leon Abbett to payment by sheriff of foregoing moneys to trustee filed.

Nov. 25. Order directing sheriff to pay over said money to Wilbur Larremore, trustee of bankrupt, filed.

18 To the Hon. Addison Brown, judge of the district court of the United States for the southern district of New York:

The petition of James McCreery, Thomas Rosevear and James Crawford McCreery, composing the firm of James McCreery & Co., of the borough of Manhattan, city of New York, and the Automatic Fire Alarm and Extinguisher Company, Limited, a domestic corporation of said borough and city, and Frank H. Beltair, of Jersey City, New Jersey, respectfully shows that Raymond W. Kenney, of the borough of Manhattan, city of New York, has for the greater portion of six months next preceding the date of filing this petition resided and still resides at No. 136 Madison avenue, in the city of New York, in the county and State of New York, and southern district of New York aforesaid, and owes debts to the amount of one thousand dollars. That your petitioners are creditors of said Raymond W. Kenney, having provable claims amounting in the aggregate in excess of securities held by them to the sum of five hundred dollars.

That the nature and amount of your petitioners' claims are as follows: James McCreery & Co., goods sold and delivered to said Raymond W. Kenney, at his request, between the 30th day of August, 1898, and the 24th day of January, 1899; the prices agreed upon amounting in the aggregate to the sum of seven hundred and ninety-two and $\frac{60}{100}$ dollars, together with interest and costs of suit, amounting in the whole to the sum of eight hundred and twenty-nine and $\frac{17}{100}$ dollars, for which sum judgment was entered on the 6th day of April, 1899.

The Automatic Fire Alarm and Extinguisher Company for furnishing protection against fire on premises No. 24 East Twenty-third street occupied by the said Raymond W. Kenney as a store the 2d day of August, 1897, to date hereof, at the sum of seventy-five dollars per year, amounting in the whole to the
19 sum of one hundred and twenty-five dollars, with interest thereon from the 1st day of January, 1898.

Frank H. Beltair, a certain judgment creditor heretofore duly

rendered and entered in an action in the city court of the city of New York, on the 17th day of March, 1899, for the sum of fifteen hundred and fifty-four and $\frac{41}{100}$ dollars against the said Raymond W. Kenney and in favor of Theodore Revillon, Leon Revillon, Analote Revillon and Victor Revillon (composing the firm of Revillon Freres). The said action was brought upon two certain promissory notes, both dated on the 6th day of September, 1898, for the sums of seven hundred and fourteen dollars and seven hundred and sixty-eight and $\frac{75}{100}$ dollars respectively, and payable five and six months after the date thereof respectively. The said judgment was by a certain indenture in writing, dated the 29th day of March, 1899, duly assigned by said Theodore Revillon, Leon Revillon, Analote Revillon and Victor Revillon, and all of them, to your petitioner, Frank H. Beltair.

And your petitioners further represent that said Raymond W. Kenney is and at all the times hereinafter mentioned was insolvent, and within four months next preceding the date of this proceeding committed an act of bankruptcy in that he did heretofore, to wit, on the 6th day of March, 1899, suffer and permit one Edward Howard Clark to obtain a judgment against him for the sum of twenty thousand dollars and upwards, and thereafter suffered all his property, not exempt by law from execution, to be sold by the sheriff of the county of New York under an execution issued upon said judgment and not having five days before such sale vacated or discharged the preference so obtained by said Edward Howard Clark.

Wherefore, your petitioners pray that service of the petition with a subpœna may be made upon said Raymond W. Kenney as provided by the acts of Congress relating to bankruptcy, and that he may be adjudged to be a bankrupt within the purview of said acts.

THOS. ROSEVEAR,
For JAMES McCREERY & COMPANY,
THE AUTOMATIC FIRE ALARM & EXTINGUISHER COMPANY, LIMITED,
By ELIGAH S. COWLES, *President*,
FRANK H. BELTAIR,
Petitioners.

Countersigned:
EUGENE G KREMER, *Attorney.*

UNITED STATES OF AMERICA,
State of New York, County of New York, } *ss:*
Southern District of New York,

Thomas Rosevear, a member of the firm of James McCreery & Co.; Eligah S. Cowles, president of the Automatic Fire Alarm and Extinguisher Company, Limited, and Frank H. Beltair, being three of the petitioners above named, do hereby make solemn oath that

the statements contained in the foregoing petition subscribed by them are true.

THOS. ROSEVEAR,
ELIGAH S. COWLES,
FRANK H. BELTAIR,
Petitioners.

Subscribed and sworn to before me this thirteenth day of April 1899.

THOS. ALEXANDER,
U. S. Comm'r.

(Endorsed:) Petition filed April 13, 1899.

21 UNITED STATES OF AMERICA, }
Southern District of New York. }

To Raymond W. Kenny, in said district, Greeting:

For certain causes offered before the district court of the United States of America within and for the southern district of New York, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said district court, to be holden at the United States Court-house and Post-office building, in said district, on the 20th day of April, A. D. 1899, to answer to a petition filed by James McCreery *et al.*, in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said district court shall consider in this behalf. And this you are in nowise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable Addison Brown, judge of said court, and the seal thereof, at the city of New York, this 13th day of April, A. D. 1899.

[SEAL.] SAMUEL H. LYMAN, *Clerk.*

I hereby certify that after diligent search I am unable to find the within-named Raymond W. Kenney in my district. I further certify that on the 13th day of April, 1899, at 136 Madison avenue, in the city of New York, in my district, that being the residence of said Raymond W. Kenney, I delivered to and left a copy of the within subpœna with an adult member of the family, to wit, Helen Kenney, his wife, and at the same time and place left with her a duplicate original of the creditors' petition for adjudication herein.

Dated New York, April 14, 1899.

WILLIAM HENKEL,
U. S. Marshal, Southern Dist. New York.

(Endorsed:) No. 778. United States district court, southern
22 district of New York. In bankruptcy. In the matter of the petition to have Raymond W. Kenney adjudged bankrupt. Subpœna. Filed Ap'l 14, 1899.

District Court of the United States, Southern District of New York.

In the Matter of the Application of JAMES McCREERY, THOMAS ROSEVEAR, and JAMES CRAWFORD McCREERY, Composing the Firm of JAMES McCREERY & Co.; THE AUTOMATIC FIRE ALARM AND EXTINGUISHER Co., LIMITED, and FRANK H. BELTAIR to Have Raymond W. Kenney Adjudged a Bankrupt. In Bankruptcy.

On the annexed affidavits of Hanford Crawford, Eugene G. Kremer and George I. Woolley, and the affidavits and copies of affidavit therein referred to, and on the petition of James McCreery, Thomas Rosevear and James Crawford McCreery, The Automatic Fire Alarm and Extinguisher Co., Limited, and Frank H. Beltair, and it appearing therefrom to my satisfaction that the said petition has been duly filed in the office of the clerk of this court, and on motion of Eugene G. Kremer, attorney for petitioner, let the said Raymond W. Kenney or his attorney, and Thomas J. Dunn, Esq., sheriff of the county of New York, and Edward Howard Clark, the said creditor, or his attorney, show cause before this court
23 at a term thereof to be holden at the Post-office building, in the borough of Manhattan, city of New York, on the 18th day of April, 1899, at ten thirty o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why the said sheriff should not be enjoined and restrained until the appointment of a trustee in the said proceeding, or until the further order of the court, from paying over any portion of the said proceeds so in his hands as aforesaid to the said Edward Howard Clark, the said creditor, and why the petitioners should not have such other, further or different order or relief in the premises as to the court may seem meet.

And it further appearing to me that unless the said sheriff is restrained from paying over any part of the said proceeds irreparable injury will result to the said petitioners, and a distribution will result contrary to the provisions of the act of Congress relating to bankruptcy, it is further

Ordered, that until the hearing and decision of this motion and the entry of an order thereon, or until the further order of this court said sheriff and his servants, agents and attorneys be and he hereby is enjoined and restrained from paying over any portion of the said proceeds to Edward Howard Clark, or his attorney or any other person.

And sufficient cause appearing therefor, let service of this order this day upon the said sheriff and upon Otto Horwitz, Esq., counsel for the said Clark and said Kenney, and upon Alexander Melhado, Esq., attorney for said Clark, at their respective offices this day, be sufficient.

Dated New York, April 13, 1899.

ADDISON BROWN,
District Judge.

24 District Court of the United States, Southern District of New York.

In the Matter of the Application of JAMES McCREERY, THOMAS ROSEVEAR, and JAMES CRAWFORD McCREERY, Composing the Firm of JAMES McCREERY & Co.; THE AUTOMATIC FIRE ALARM AND EXTINGUISHER Co., LIMITED, and FRANK H. BELTAIR to Have Raymond W. Kenney Adjudged a Bankrupt. In Bankruptcy.

COUNTY OF NEW YORK, *ss:*

Hanford Crawford, being duly sworn, deposes and says that he is general manager for James McCreery & Co., one of the creditors above named.

That he is informed and believes that Raymond W. Kenney above named is insolvent. The source of deponent's information and the grounds of his belief as to the said fact are the affidavit of William B. Ellison, of which a certified copy is hereto annexed and hereby made a part hereof, the original of which is on file in the office of the clerk of the county of New York.

That the reason why an affidavit of the said fact is not obtained from the said Ellison is that deponent has not sufficient time before making this application in which to obtain such affidavit.

Deponent further says that he is informed and believes
25 that a judgment has been obtained in the county of New York against the said Kenney in favor of one Edward Howard Clark for about $20,000 or more, and that execution has been issued pursuant to the said judgment to the sheriff of the county of New York and the property of the said Kenney sold in pursuance of said execution, and that the proceeds of said property amount to about $12,000, and are now in the hands of the sheriff of the county of New York, and are about to be paid over to the said Clark. That the said judgment was suffered or permitted by the said Kenney in favor of the said Clark while the said Kenney was insolvent, thus enabling the said Clark, who was an alleged creditor of the said Kenney, to obtain a preference through such legal proceedings, and that the said Clark did not at least five days before the sale of the property affected by such preference vacate or discharge such preference, and the source of deponent's information and grounds of his belief as to the said facts are the annexed affidavits and copies of affidavits.

Deponent further says that he is informed and believes that the said Kenney transferred while insolvent a portion of his property to one or more of his creditors, to wit, to the said Edward Howard Clark, with intent to prefer such creditor over his other creditors, and the source of his information and the grounds of his belief as to the said fact are the said affidavits and copy — affidavits.

Deponent further says that he is informed and believes that there was no consideration for the notes upon which said judgment in favor of said Clark was rendered, and the source of deponent's information and the grounds of his belief as to the said fact are

the affidavit of Thomas Wilmot Wood, now in the custody of the clerk of part 1 of special term of the supreme court of the State of New York for the county of New York, a copy of which is annexed hereto and hereby made part hereof. That the reason why
26 an affidavit of said Wood is not obtained on this application is that deponent has not time to procure such affidavit before the making of this application.

Deponent further says that he is informed and believes that there is imminent danger of the said proceeds now in the hands of the sheriff of the county of New York, as aforesaid, being paid over to the said Clark, and the source of his information and grounds of his belief as to the said facts are the affidavit of Eugene G. Kremer, hereto annexed.

Deponent further says that he is informed and believes that judgments to the amount of about thirty thousand dollars appear of record in the county of New York against the said Kenney; that an attachment suit for about eighteen thousand dollars is now pending against him; and that he is hopelessly insolvent, and that said Edward Howard Clark is a non-resident of this State and a resident of the State of Maine, and the source of deponent's information and the grounds of his belief as to said facts are the said annexed affidavits, all of which are hereby made part hereof.

Deponent therefore asks that the sheriff, Thomas J. Dunn, Esq., be enjoined and restrained from paying over to the said Edward Howard Clark any part of the said proceeds so in his hands.

Deponent further says that it appearing from the facts in said affidavits set forth that said Raymond W. Kenney is insolvent; that Edward Howard Clark is a non-resident, and that the sheriff is about to pay the proceeds so in his hands to said Clark, the petitioners and other creditors being entitled to a ratable share of said proceeds, will by said payment so threatened to be made be irreparably injured.

HANFORD CRAWFORD.

Sworn to before me this 13th day of April, 1899.

M. J. DEERY,

[L. S.] *Notary Public* (21), *New York Co.*

27 District Court of the United States, Southern District of New York.

In the Matter of the Application of JAMES McCREERY, THOMAS ROSEVEAR, and JAMES CRAWFORD McCREERY, Composing the Firm of JAMES McCREERY & Co.; THE AUTOMATIC FIRE ALARM AND EXTINGUISHER COMPANY, and FRANK K. BELTAIR to Have Raymond W. Kenney Adjudged a Bankrupt. In Bankruptcy.

COUNTY OF NEW YORK, *ss:*

Eugene G. Kremer, being duly sworn, deposes and says: That on the 12th day of April, 1899, he had a conversation by telephone with Frank J. Burns, a deputy sheriff of the county of New York. That deponent is familiar with the voice of said Burns and recog-

nized his voice in speaking with him over the telephone on said day. Deponent inquired of the said Burns whether he had levied upon property of Raymond W. Kenney above named. The said Burns stated to deponent that he had levied upon property of the said Kenney under an execution issued to the sheriff of the said county pursuant to a judgment obtained against the said Kenney on or about March 6, 1899, in favor of Edward Howard Clark, for an amount exceeding $20,000, and that the property so levied upon had been sold by the sheriff and the proceeds, amounting to about $12,000, were
28 now in the hands of the sheriff. The said Burns further stated to deponent that an injunction had been obtained which prevented the sheriff from paying over the said proceeds to the said Clark, but that as soon as the sheriff received a certified copy of an order vacating the said injunction the said proceeds would be forthwith turned over to the said Clark or his representative. That said proceeds are all of the property of said Kenney and that he has no other property.

Deponent further says that on said 12th day of April, 1899, he was informed by William B. Ellison, Esq., an attorney and counsellor at law, of the State of New York, that a decision had been handed down by the Hon. Henry W. Bookstaver, a justice of the supreme court of said State, vacating the injunction theretofore granted in a certain action entitled Leon Abbett, plaintiff, against Edward Howard Clark, Raymond W. Kenney and Thomas J. Dunn as sheriff of the county of New York, defendants, restraining the said Dunn as sheriff from paying over the proceeds of the property sold by him under the execution issued pursuant to the judgment obtained by Edward Howard Clark against Raymond W. Kenney, and said Ellison further informed deponent that he had received notice of settlement of an order vacating the said injunction for April 13, 1899, that is to say, this day, at 10.30 in the forenoon. Deponent received this information from the said Ellison late in the afternoon of said April 12, and it is impossible within the time at deponent's disposal to obtain from the said Ellison an affidavit of the said facts.

Deponent further says that he has reason to believe and does believe that unless an order is granted by this court restraining the payment of the said proceeds to the said sheriff, that the order vacating the said injunction will be settled and the said injunction vacated, and that thereupon said sheriff will pay over the proceeds to the said Clark.

29 Deponent further says that as attorney for James McCreery, Thomas Rosevear, James Crawford McCreery, the Automatic Fire Alarm and Extinguisher Company, Limited, and Frank H. Beltair, he this day filed a petition praying that the said Raymond W. Kenney be adjudged by the court to be a bankrupt within the purview of the acts of Congress relating to bankruptcy, and that no further or other proceedings in regard to said application have been taken, and no trustee has been appointed.

Deponent further says that no previous application for this relief has been made to any court or judge, and that an order to show

cause is applied for, because adequate relief cannot be had upon the usual notice of motion.

E. G. KREMER.

Sworn to before me this 13th day of April, 1899.

M. J. DEERY,
Notary Public (21), *New York Co.*

[L. S.]

30 District Court of the United States, Southern District of New York.

In the Matter of the Application of JAMES McCREERY, THOMAS ROSEVEAR, and JAMES CRAWFORD McCREERY, Composing the Firm of JAMES McCREERY & Co.; THE AUTOMATIC FIRE ALARM COMPANY, and FRANK H. BELTAIR to Have Raymond W. Kenney Adjudged a Bankrupt.

COUNTY OF NEW YORK, *ss:*

George I. Woolley, being duly sworn, deposes and says: That annexed hereto is a copy of an affidavit of Thomas Wilmot Wood, which deponent has compared with the original affidavit of said Thomas Wilmot Wood now in the custody of the clerk of part 1 of special term of the supreme court of the State of New York, for the county of New York, and which affidavit purports to have been verified before Joseph B. Brannan, a notary public for New York county, and that the same is a true and correct copy of said affidavit and of the whole thereof.

Deponent further says that he has searched for judgments against Raymond W. Kenney above named in the office of the clerk of the county of New York, and finds therein docketed the following judgments:

31

March 6th, 1899. Raymond W. Kenney at the suit of Edward Howard Clark, $20,906.66.
March 17th, 1899. Same at the suit of Theodore Revillon *et al.*, $1,554.41.
March 20th, 1899. Same at the suit of Otto Erler, $1,735.39.
March 20th, 1899. Same at the suit of same, $598.15.
March 20th, 1899. Same at the suit of same, $475.66.
March 28th, 1899. Same at the suit of Second national bank, $534.31.
March 30th, 1899. Same at the suit of the Bank of the State of New York, $571.62.
April 1, 1899. Same at the suit of the New York County national bank, $475.51.
April 5th, 1899. Same at the suit of Isaac Wiesner, $108.35.
April 6th, 1899. Same at the suit of James McCreery *et al.*, $829.17.
April 8th, 1899. Same at the suit of Philip Klein, $141.22.
March 7th, 1899. Same at the suit of Peter M. Grunibaldt, $984.71.

That all of said judgments remain unsatisfied of record.

That the aforesaid judgment obtained March 6, 1899, by Edward Howard Clark, appears to have been obtained for him by one Alexander Melhado as attorney, and deponent is informed and believes that Otto Horwitz, Esq., is counsel for the said Edward Howard Clark and Raymond W. Kenney. That deponent has examined the judgment-roll in said action, and it appears therefrom that said Kenney did not appear in or defend said action.

GEORGE I. WOOLLEY.

Sworn to before me this 13th day of April, 1899.

M. J. DEERY,

[L. S.] *Notary Public* (21), *New York Co.*

32 Supreme Court, New York County.

LEON ABBETT, Plaintiff,
vs
RAYMOND W. KENNEY, Defendant.

COUNTY OF NEW YORK, *ss:*

William B. Ellison, being duly sworn, deposes and says:

I. That he is the attorney for the plaintiff above named.

II. That he was present at the conversation referred to in the affidavit of the plaintiff, had between the parties hereto, on the 2d day of March, 1899, and heard the defendant distinctly state that his whole indebtedness, other than that owing to the plaintiff, was for merchandise and was about $14,000. Absolutely nothing was said by the defendant at that time about his owing his wife's family any sum whatever.

III. That he was also present at the conversation referred to in the plaintiff's affidavit had between the parties hereto, on the 3d day of March, 1899, and heard the defendant suggest that the plaintiff advance him more money, and distinctly state that if he did not obtain more money, he, the defendant, would have to stop business,

33 in which event he would make confession of judgment in favor of members of his wife's family to secure to them $20,000 which he then stated that he owed them, and that if the plaintiff would agree to pay them the $20,000 referred to he, the defendant, would then make transfers of his property to the plaintiff. Deponent then asked the defendant for the amount of his debts and he then again stated that he was unable to pay his debts and that he owed about $14,000 to general creditors over and above his indebtedness to the plaintiff, but on this occasion he added to his alleged indebtedness an alleged indebtedness of $20,000 to his wife's family, and emphatically assured the plaintiff and deponent that he would secure that sum to them in any event; that they would have to be protected first.

WILLIAM B. ELLISON.

Sworn to before me this 6th day of March, 1899.
MARGARET M. DICKIE,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

STATE OF NEW YORK, } ss:
County of New York, }

I, William Sohmer, clerk of the said county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original affidavit of William B. Ellison filed March 6, 1899, on file in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In witness whereof, I have hereunto subscribed my name, and affixed my official seal this 13th day of April, 1899.
WM. SOHMER, *Clerk.*
[SEAL.]

(Stamp.)

34 Supreme Court, New York County.

LEON ABBETT, Plaintiff,
vs.
EDWARD HOWARD CLARK, RAYMOND W. KENNEY, and THOMAS J. Dunn, as Sheriff of the County of New York, Defendants.

COUNTY OF NEW YORK, ss:

Thomas Wilmot Wood, being duly sworn, deposes and says:

I. That about the middle of July, 1894, he entered the employ of the defendant Raymond W. Kenney, in the capacity of book-keeper and cashier, and continued in such employ continually down to about June 25, 1898.

II. That during the whole time of such employment deponent had sole charge of the books of account of the said Kenney and was and is familiar with the details of the business of the said Kenney during that period.

III. That deponent remembers distinctly the signing by the said Kenney of certain notes in 1894, and another in 1896, payable to the order of Helen L. Kenney, and his present recollection is that he, the deponent, wrote said notes at the direction of the said Kenney, and although the said notes were by the said Kenney directed to

35 be made to bear different dates, all of said notes, except one made in 1896, were drawn and signed on the same date, and all of them were dated back a long while, and they were not made or signed on the dates they bear. At the time when the said notes, save the one made in 1896, were so drawn and signed, the said Kenney was then being pressed for the payment of a large sum of money by the Messrs. Asche & Jaekel, furriers, of this city, amounting to about $27,000.

IV. That shortly after the actual making of said notes, as afore-

said, deponent under the direction of the said Kenney, credited the latter's account with the amount thereof, and the same were not, nor was any of them, or the amounts represented thereby, credited to the said Helen L. Kenney, nor were they or any of them ever carried among the bills payable of the said Kenney, or directly or indirectly entered, treated, or considered as a liability of the said Kenney.

V. That when the said notes were actually made as aforesaid, the same were deposited in the private drawer of the said Kenney, in the safe then in use in his business, and were kept there until after the same all became due, and up to that time they had not been endorsed or transferred by the said Helen L. Kenney, nor had they, as deponent verily believes, ever been out of the possession of the said Kenney, and deponent is certain that after the said notes were due they were still in said private drawer and in all respects subject to the control of the said Kenney.

VI. That after the said notes had become due as aforesaid, deponent saw the said Kenney take said notes out of his said private drawer, and he thereupon told deponent that they were useless.

VII. That deponent made up and presented to the plain-
36 tiff many statements purporting to show all of the liabilities and assets of the said Kenney, every one of which said statements he first showed to the said Kenney, and they were by the said Kenney examined before they were sent to the said plaintiff, but upon absolutely none of such statements were any of said notes ever made to appear or treated or considered as among the liabilities the said Kenney, and that fact that the said Kenney well knew in every instance, and deponent knows of his own knowledge that the statements made by the said Kenney to the commercial agencies and the banks, purporting to show his assets and liabilities, never were made to show any of said notes, and the same were never treated or considered among such liabilities.

VIII. That both before and after the said notes became due, the said Helen L. Kenney came, from time to time, to the store of the said Kenney for money, and deponent, by direction of said Kenney, gave her checks, but all of such checks were charged to the account of the said Kenney and were not charged to the said Helen L. Kenney.

IX. That the defendant Edward Howard Clark, is, as deponent was informed by the said Kenney, the father of the said Helen L. Kenney, and the said Clark was, during deponent's said employment, as deponent was also informed by said Kenney, a resident of the State of Maine.

X. That during deponent's said employment, the said Clark had no connection with the business of the said Kenney, nor had any business transactions therewith other than the possible purchase of a cap or some other article, and the books of the said Kenney never showed any indebtedness to or from the said Clark. That the said Clark rarely came to the said store of the said Kenney; in fact, during the whole time of deponent's said employment depo-
37 nent never saw the said Clark in said store more than three times, and deponent does not believe that the said Clark

could or did have any knowledge of the financial condition of the business of the said Kenney, but on the contrary, the said Kenney spoke in a very disrespectful way of the said Clark, and claimed to tolerate him solely because he was his wife's father.

(S'g'd) THOMAS WILMOT WOOD.

Subscribed and sworn to before me this 18th day of March, 1899.

(S'g'd) JOSEPH B. BRAMAN,
Notary Public, New York County.

District Court of the United States, Southern District of New York.

In the Matter of the Application of JAMES McCREERY, THOMAS ROSEVEAR, and JAMES CRAWFORD McCREERY, Composing the Firm of JAMES McCREERY & Co.; THE AUTOMATIC FIRE ALARM AND EXTINGUISHER Co., and FRANK H. BELTAIR to Have Raymond W. Kenney Adjudged a Bankrupt. In Bankruptcy.

COUNTY OF NEW YORK, *ss:*

38 William B. Ellison, being duly sworn, deposes and says that he is attorney for Leon Abbett in a certain suit pending in the supreme court of the State of New York for the county of New York, in which he obtained an injunction against Edward Howard Clark and Thomas J. Dunn, sheriff of the county of New York, restraining and enjoining the said sheriff from paying over the sum of $12,000 now in the hands of the said sheriff to the said Edward Howard Clark. That plaintiff's motion in the said suit to continue the said injunction has been argued and a decision handed down by the Hon. Henry W. Bookstaver, a justice of the said court, denying the motion to continue the said injunction. A notice of settlement of the order denying the said motion to continue the said injunction and vacating the said injunction has been served upon deponent returnable this morning at 10.30, and deponent has reason to believe and does believe that upon the settlement of the said order vacating the said injunction the money now in the hands of the sheriff, being the proceeds of property formerly of Raymond W. Kenney, will be immediately thereupon paid over to Edward Howard Clark, the execution creditor.

Deponent further says that the statements contained in an affidavit sworn to by him the 6th day of March, 1899, in an action entitled Leon Abbett against Raymond W. Kenney and filed in the office of the clerk of the county of New York on said day, a copy of which is hereto annexed, are true.

WILLIAM B. ELLISON.

Sworn to before me this 13th day of April, 1899.

M. J. DEERY,
Notary Public (21), *New York Co.*

[L. S.]

(Endorsed:) Affidavits & order to show cause for injunction. Filed April 10, 1900.

39 In the District Court of the United States for the Southern District of New York.

In the Matter of the Application of JAMES MCCREERY, THOMAS ROSEVEAR, and JAMES CRAWFORD MCCREERY, Composing the Firm of JAMES MCCREERY & Co.; THE AUTOMATIC FIRE ALARM AND EXTINGUISHER Co., LIMITED, and FRANK H. BELTAIR to Have Raymond W. Kenney Adjudged a Bankrupt. In Bankruptcy.

At the city of New York, borough of Manhattan, in the said district, on the 20th day of April, A. D. 1899.

And now the said Raymond W. Kenney appears and denies that he has committed the act of bankruptcy set forth in the petition herein or that he is insolvent, and avers that he should not be declared a bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court.

RAYMOND W. KENNEY.

Sworn to before me this 17th day of April, 1899.

C. L. WIEBE,
Notary Public, Kings Co.

[SEAL.]

Certificate filed in N. Y. Co.

HORWITZ & SAMUELS,
Attorneys for Raymond W. Kenney.

Office and post-office address, 346 Broadway, New York city, New York.

(Endorsed:) Answer filed April 20, 1899.

40 In the District Court of the United States for the Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt. In Bankruptcy.

At New York city, in said district, on the 12th day of July, A. D. 1899, before the Hon. Addison Brown, judge of the said court in bankruptcy, the petition of James McCreery, Thomas Rosevear and James Crawford McCreery, composing the firm of James McCreery & Co., The Automatic Fire Alarm and Extinguisher Company, Limited, and Frank H. Beltair, that Raymond W. Kenney be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been filed on the 13th day of April, 1899, and the answer of Raymond W. Kenney denying his insolvency and denying the commission of an act of bankruptcy having been filed on April 20, 1899; and the said issue coming on to be tried, and the proofs of the respective parties having been taken, and Leon Abbett as a creditor of the said Raymond W. Kenney, having filed a petition asking for the same relief, on the 8th day of June, 1899, and the said petitions and testimony and the

arguments thereon having been heard and duly considered, and the court having handed down its decision on June 15, 1899, concluding that the defendant Raymond W. Kenney was insolvent on April 13, 1899, and committed the acts of bankruptcy alleged in the petition, but withholding adjudication until some com-

41 petent additional creditor joins in the petition, and Philip Klein, a creditor, having filed his petition on or about June 16, 1899, thereupon the court having decided that the adjudication would be made unless objections should be made to the additional petition and noticed for June 21, and on said June 21, the counsel for the said Raymond W. Kenney having filed objections, and the said counsel having on the 5th day of July, in open court, withdrawn the said objections, the said Raymond W. Kenney is hereby declared and adjudged a bankrupt accordingly; and it is further

Ordered, that the petitioning creditors do recover, and that they be paid out of the estate their taxed costs and disbursements of this proceeding; and it is further

Ordered, that the said bankrupt file schedules in triplicate, as required by law, within ten days from the date hereof; and it is further

Ordered, that the said matter be referred to Ernest Hall, one of the referees in bankruptcy of this court, to take all such further proceedings therein as are required by said acts of Congress, and all such acts therein as the court might take or perform, except such as by law or the general orders of the supreme court are required to be performed by the judge; and that the said bankrupt shall attend before said referee on the 17th day of July, 1899, at 10 o'clock a. m., and thenceforth shall submit to such orders as may be made by said referee or by the court relating to said bankruptcy.

Witness, the Honorable Addison Brown, judge of the said court, and the seal thereof, at the city of New York, in said district, on the 12th day of July, A. D. 1899.

ADDISON BROWN,
District Judge.

[L. S.] SAM'L H. LYMAN, *Clerk.*

(Endorsed:) Order of adjudication of bankruptcy. Filed July 11, 1899.

42 United States District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

It is hereby stipulated that the petitioner, Edward Howard Clark, admits the jurisdiction of the district court of the United States for the southern district of New York, to adjudicate Raymond W. Kenney a bankrupt, and that said Raymond W. Kenney was duly adjudicated such bankrupt in said court, on the 12th day of July, 1899.

It is further stipulated that the testimony taken before the court and before the referee, need not be printed in full, but that the following is a summary of such testimony.

It is further stipulated that any party may produce and read the said testimony upon the argument of the petition for review of the order of Honorable Addison Brown entered ——, 1899, with the same force and effect as if printed in full herein.

Summary of the Testimony Taken Before the Court.

Eugene G. Kremer appears for petitioning creditors.
Horwitz & Samuels appear for Raymond W. Kenney, respondent.

WILLIAM H. HALL, testified that he was a furrier and had
43 been in that business for fifty years; that he was present in March, 1899, at the sale of the stock of Kenney under the execution, and purchased there about $2,000 worth of goods. That he examined three-quarters of the stock and valued the same at $20,000 to $25,000.

KENNEY testified that in March, 1899, before the recovery of the Clarke judgment, he, at the request of Mr. Leon Abbett, from whom he was proposing to borrow $4,500 took an inventory, and according to that inventory the liabilities at that time were $50,002.19, and his assets were $109,837.70, consisting of outstanding accounts, $10,449.52; bills receivable, $1,014.43; machinery and fixtures, $5,000; merchandise, $43,320.89; cash, $53.86; lease on property at No. 24 East Twenty-third street worth $50,000.

This lease he had transferred to Leon Abbett as security for any advances that he might make for Kenney thereafter and for any amount that he then owed him, the date of the transfer being June 30, 1896, and that Mr. Abbett then relet the property to Mr. Kenney.

The $50,000 of liabilities was made up of open accounts, $6,176.30; bills payable, $12,319.23; Edward Howard Clarke judgment, $20,906.66; mortgage on aforesaid lease, $10,000, with interest $600.

He testified that Edward Howard Clarke was his wife's father; that he had no consultation with him before the bringing of the latter's suit against him, nor with Mr. George Bell, the attorney of said Clarke, nor with his wife, Mrs. Kenney, and that the bringing of the Clarke suit was unexpected to him; that the notes on which the suit was brought were notes made by him to the order of his wife in 1894, and were kept in a private drawer in his safe. About June, 1898, he took the notes, which were in a bundle of papers belonging to Mrs. Kenney and gave them to her. He further testified that he had assigned $7,000 or $8,000 of the accounts receivable (specified before as amounting to $10,449.52), to Mr. Edward
44 Howard Clarke, between March 4th and 6th, 1899, as security for the notes above specified. Mr. George Bell acted as attorney for Clarke. A number of the accounts had been collected. The checks were sent to his order and he endorsed them. Mr. Clarke's attorney had the checks collected.

He testified that Mr. Leon Abbett would discount notes or make loans for him, and in about once in six months or a year, the latter would make up his statement and give it to Kenney to see if it

agreed with the latter's books, and it then was returned to Mr. Abbett.

He further testified that he had made a subsequent assignment of his equity in the lease to Mr. Abbett for one dollar and legal services; that at that time Mr. Abbett was his attorney and as he was in the habit of travelling, he made the assignment so that Mr. Abbett could collect the rentals and make leases while he was away, but that he did not owe him anything for legal services; that Abbett was also his creditor and was actually engaged in managing his business while he was away and furnished money on endorsements from time to time, when called on by Kenney for expenses in carrying on the business while he was away.

GILBERT E. YOUMAN, book-keeper of Kenney, testified that on March 6, 1897, his assets amounted to $109,837.20, and his liabilities amounted to $50,002.19, made up in the same manner as testified to above by Mr. Kenney.

ALEXANDER MELHADO testified that he as attorney for Clarke; recovered his judgment against Kenney; that Mr. Bell retained him and delivered the notes to him; that he did not authorize Mr. George Bell to prepare any papers in his name, but gave Bell the summons to serve in that action; that witness was the attorney for Clarke when the judgment was filed, and on which occasion his duty ended by operation of law and Bell was the attorney for Clarke in issuing the execution.

FRANK J. BURNS testified that he was a deputy sheriff of the county of New York, and levied the execution under the judgment of Clarke against Kenney, and sold the latter's goods and fixtures thereunder; that at that time he had an attachment of Leon Abbett against Kenney for sixteen or seventeen thousand dollars.

The execution in favor of Edward Howard Clarke against Raymond W. Kenny was offered in evidence and was dated March 6, 1899, and was issued out of the supreme court of the State of New York, and commanded the sheriff to make the sum of $20,906.66 to satisfy the above-mentioned judgment of Clarke against Kenney, and was returnable sixty days from its date, and was signed by George Bell as attorney for Clarke.

LOUIS SCHRAG testified that he was a real-estate agent; that he knew the premises occupied by Kenney as a furrier at No. 24 East Twenty-third street, and that he considered its rental value about $15,500 per annum.

CHARLES I. SMITH testified that he was in the business of making mortgage loans; was familiar with the rental value of Kenney's said property and considered the same about $16,500 per annum.

LUIZ ADOLF DACUHNA testified that he was in the real-estate business; was familiar with the rental value of Mr. Kenney's said property and considered its rental value about $15,500 per annum, less twenty per cent. for loss through vacancies.

HUGO J. MISCHO testified that he was a furrier and was present at the execution sale of Mr. Kenney's stock and that in his opinion the goods brought from thirty-three and one-third up to fifty per
46 cent. of the cost of manufacture, the total average being about thirty cents on the dollar of their real value.

Mr. KENNEY, further recalled, testified that he had been offered $10,000 a year rent for the store and basement and had refused the same.

JOSEPH ENGEL testified that he was a manufacturer of furs and that the lowest prices of furs was in March; that they depreciated from October to that date from twenty-five to fifty per cent. He was not acquainted with Mr. Kenney's stock.

ERNEST M. EVVERS testified that he was in the fur business and knew the stock of Mr. Kenney, and that the stock was worth in March, 1899, about $25,000.

LEON ABBETT testified that he claimed that Kenney owed him about $27,000 in 1897, and since then about $18,000. He considered the lease which Kenney had assigned to him as worth absolutely nothing. He noticed Kenney nodding and beckoning to the auctioneer at the execution sale, and after that the goods were knocked down, and the announcement was made that they were purchased by Otto Wagner who was standing alongside of Mr. Kenney at the time.

ARCHIBALD B. DUFFY testified that he was in the real-estate business and knew the rental value of Kenney's property and considered it about $10,000 per annum.

SAMUEL LIVINGSTON testified that he assisted in taking Kenney's stock under the inventory made by him for Abbett, and that certain of the goods were taken at an average of thirty cents on the dollar, and the rest at cost, and that the value of the stock was about $44,000, the fixtures about $5,000.

47 OTTO WAGNER testified for Kenney that he is in the fur business and purchased $4,800 worth of furs at the Kenney execution sale, but that their real value was about $12,000.

Mr. LEON ABBETT testified that a short time after the levy of the Clarke execution he obtained a writ of attachment against Mr. Kenney on his alleged indebtedness against the latter, and thereafter brought a suit in equity based on that writ of attachment in the supreme court of the State of New York, attacking the Clarke judgment on the charge of its being entered on a fictitious debt, obtaining in said action a temporary injunction restraining the collection of that judgment. That thereafter a motion for the continuance of this temporary injunction was heard before Judge Bookstaver, one of the justices of said court, on affidavits, the issues being the question of the validity and *bona fides* of the Clarke judgment

and the hearing resulted in an adverse decision to Mr. Abbett and the temporary injunction was dissolved.

That an application for a stay on appeal was made by Abbett and the application denied; that the order dissolving the injunction was signed at eleven o'clock, on the 13th day of April, 1899, and that between nine and ten-thirty o'clock in the morning of the same day, the involuntary petition in bankruptcy herein was filed and the restraining order of this court issued and served on the sheriff.

The claim of Mr. Beltair set out in the petition was a judgment of Revillon Frares for $1,544.41 against Kenny, and that he did not own said judgment. He was the endorser on the notes upon which said judgment was recovered and paid the amount of the judgment and procured a blank assignment of the same. His attorney, Mr. Ellison, had sold the judgment, but he did not know what he had accepted for it.

The court ruled that it appeared from Mr. Abbett that he owned the judgment of Revillon Frares, inasmuch as he was an en-
48 dorser on the notes and paid the judgment and thereby became the owner thereof, and that consequently Mr. Beltair had no right to join in the petition it not having been proven that he was the owner.

On further time being given by the court for a new creditor to join in the petition, Mr. Abbett filed a petition to be permitted to join as such, on June 8, 1899.

The court ruled that its conclusion was, that Kenney was insolvent on April 13, 1899, and permitted the acts of bankruptcy claimed, but that it had such doubts of the competency of Mr. Abbett to join as a creditor, as a possible partner, that it must withhold adjudication until some competent additional creditor join in the petition. Thereupon Mr. Phillip Klein came in as a petitioning creditor on June 15, 1899.

Thereafter the objections of Mr. Kenny to being adjudicated a bankrupt having been withdrawn, the court duly adjudicated him a bankrupt on July 12, 1899.

GEORGE BELL,
Attorney for Edward Howard Clarke.

STICKNEY, SPENCER & ORDWAY,
Attorneys for Wilbur Larremore, Esq., Trustee for Raymond W. Kenney.

PHILIP J. BRITT,
Attorney for Thomas J. Dunn, Sheriff of the County of New York.

EUGENE G. KREMER,
Attorney for Petitioning Creditors.

WILLIAM B. ELLISON,
Attorney for Leon Abbett, Jr., Creditor.

HORWITZ & SAMUELS,
Attorneys for Raymond W. Kenney.

49 District Court of the United States, Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } ss.:

George Bell, being duly sworn, says: I am attorney for Edward Howard Clark, who appears specially herein for the purpose of opposing the motion to continue the restraining order herein against him and for no other purpose. Said Clark recovered a judgment against Raymond W. Kenney, the above-named bankrupt, in the supreme court of the State of New York, for $20,906.66, on the 6th day of March, 1899. An execution in due form of law was on the same day issued upon said judgment by me as attorney for said Clark to the sheriff of New York county, and a levy was made thereunder by virtue of which execution and levy the sheriff of New York county sold certain property of the said Kenney, realizing therefrom the sum of $12,451.09 over the expenses of the sale. Such sale took place on the 15th day of March, 1899, and immediately thereafter said property so sold was delivered by the said sheriff to the several purchasers thereof who paid to said sheriff the price bid therefor by them. All of said property was sold to *bona fide* purchasers for value at said sheriff sale and was delivered and paid for and the money received by said sheriff long before
50 the 13th day of April, 1899, the date when the petition for an involuntary adjudication in bankruptcy was filed in this court against said Kenney by certain alleged creditors.

Immediately after the receipt of the proceeds of sale by said sheriff as aforesaid one Leon Abbett began an action in the supreme court of the State of New York against said Kenney and said sheriff and said Edward Howard Clark, alleging that said judgment recovered by Clark as aforesaid was fraudulent and void and without consideration and an obstacle to the collection of the alleged debt of said Kenney to said Abbett as an attaching creditor, and praying that said judgment of Clark against Kenney be vacated and set aside, and a temporary injunction was obtained by said Abbett in said action restraining the sheriff from paying and said Clark from receiving said proceeds of sale. Upon the hearing of a motion by said Abbett to continue said temporary injunction until final judgment in said action said motion was heard upon its merits and was denied and the temporary injunction vacated and set aside by the order of said supreme court.

Upon said motion proofs were made by said Clark showing that the claim of said Clark against said Kenney was upon valid and subsisting obligations for money loaned to said Kenney and the source of the loan and the delivery to Kenney and its use by him and non-payment thereof was fully and conclusively proven. In addition thereto it was shown by such proofs that said Abbett had full knowledge of the loans and acted as attorney in relation thereto

in almost, if not every, instance. Upon the day when said injunction was vacated said Abbett, in the name of one Beltaire, to whom said Abbett had procured an alleged claim against said Kenney to be assigned, upon payment of the amount thereof by said Abbett, as appears from the testimony taken herein upon the contested adjudication, together with other alleged creditors, filed the petition in bankruptcy herein against the said Kenney, and upon the
51 same day procured from this court a restraining order enjoining the sheriff from paying over said proceeds of sale to Clark, and said sheriff accordingly still holds said proceeds.

The affidavits presented to this court do not contain any allegation of facts tending to show a preference to said Clark which he or his agents had reasonable cause to believe was intended as such by means of said judgment and execution sale, and contain no allegation of any such preference, but only entirely upon the alleged fraudulent character of the judgment. In support of that contention the moving affidavits do not contain a single allegation which was not before the supreme court of New York when that court vacated the injunction aforesaid. The petitioning creditors present upon the question of the *bona fides* of this judgment only the affidavits used on behalf of the plaintiff Abbett in said action, together with an original affidavit of Abbett's attorney to the effect that his affidavit in the State-court action was true.

At the time of the presentation of the application to this court for the restraining order the State court had passed upon the affidavits on behalf of the plaintiff, and upon the answering affidavits on behalf of the defendants Kenney and Clark therein, and on all the evidence then presented had declared that the judgment aforesaid of Clark against Kenney was not fraudulent but was a valid and subsisting claim and founded upon a valuable consideration. The petitioning creditors well knew that the State court had so decided when they presented this application for a restraining order. The answering affidavits on behalf of the defendants as aforesaid were on file in the office of the clerk of the county of New York, together with the affidavits on behalf of said Abbett and the memorandum of the judge of said supreme court, deciding to vacate said injunction at the time when the petitioning creditors obtained from
52 said Clark the certified copies of the affidavits on behalf of said Abbett used on the motion now before the court.

GEORGE BELL.

Subscribed and sworn to before me this 5th day of July, 1899.

BENJAMIN PATTERSON,
Notary Public, N. Y. Co.

[SEAL.]

(Endorsed:) Affidavit for E. H. Clark. Filed April 10, 1900.

At a term of the United States district court for the southern district of New York, held at the court-room thereof, in the Post-office building, in the borough of Manhattan, city of New York, on the 14th day of August, 1899.

Present: Hon. Addison Brown, district judge.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

Whereas, on the 20th day of July, 1899, an order was made herein by the judge of this court enjoining and restraining the sheriff of the county of New York from paying over to Edward Howard Clarke a certain sum of money in the hands of said sheriff by virtue of a writ of execution theretofore issued upon a judgment in favor of said Edward Howard Clarke against the said Raymond W. Kenney until the further order of the court, and further directing
53 that the said sheriff be directed to pay over the said sum to the trustee or trustees of the estate of said Raymond W. Kenney upon the demand of such trustee upon his appointment and qualification; and

Whereas, it appears that the said Edward Howard Clarke has served upon the attorneys of the petitioning creditors herein his petition for a review of said order in the circuit — of appeals in the United States for the second circuit; and

Whereas, the said Edward Howard Clarke desires to stay the proceedings under said order until the determination of said petition for review:

Now, upon reading and filing the affidavit of George Bell, verified the 8th day of August, 1899, and notice of said motion, and after hearing S. Livingston Samuels, of counsel for said Clarke in support of said motion, and Edwin Kalish, Esq., of counsel for the petitioning creditors herein in opposition thereto:

Now, upon motion of George Bell, attorney for said Edward Howard Clarke, it is hereby

Ordered, that so much of said order as directs the payment of said money by the sheriff as aforesaid to the said trustee be, and the same hereby is, stayed until the determination of said petition for review, or until the further order of the court, on condition that within ten days the said Clarke file a bond with approved security in the sum of twelve thousand seven hundred and fifty-one and $\frac{9}{100}$ ($12,751.09) dollars for the payment by the sheriff of the sum heretofore ordered to be paid, in case said order be affirmed on the review thereof in the circuit court of appeals, with interest thereon, pending said appeal to said court, if so ordered; and for the payment of all sums, costs and damages that may be ordered paid by said appellate court, said review to be brought to a hearing at the October term and first session of said appellate court.

ADDISON BROWN.

(Endorsed:) Order staying proceedings pending review. Filed Aug. 15, 1899.

54 United States District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

SIRS: Please take notice that upon the affidavit of George Bell, verified the 14th day of October, 1899, I shall move this court, at a stated term thereof, to be held at the United States Post-office building, in the borough of Manhattan, in the city of New York, at the

court-room of said building, on the 18th day of October, 1899, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order resettling the order made herein on the 20th day of July, 1899, by striking out that portion of the said order which directs the sheriff of the county of New York to pay over the sum of money made by him under the execution in favor of Edward Howard Clark against Raymond W. Kenney to the trustee in bankruptcy for said Kenney.

Dated New York, October 14, 1899.

Yours, &c.,

GEORGE BELL,
Attorney for Edward Howard Clarke.

Office, 302 Broadway, New York city, New York.

To Eugene G. Kremer, Esq., attorney for petitioning creditors, 120 Broadway, New York city; Messrs. Stickney, Spencer & Ordway, attorneys for Wilbur Laramore, 31 Nassau street, New York city.

55 United States District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

COUNTY OF NEW YORK, *ss:*

George Bell, being duly sworn, says: I am the attorney for Edward Howard Clarke, and appear herein especially for the purpose of moving for the resettlement of the order herein made July 20, 1899, by striking out that portion of the same which directs the sheriff of the county of New York to pay over the sum of money mentioned in said order to the trustee of Raymond W. Kenney, and for no other purpose.

An involuntary petition for the adjudication of Raymond W. Kenney as a bankrupt was filed herein on April 13, 1899, and thereafter such proceedings were had that said Raymond W. Kenney was duly adjudicated a bankrupt. On the same day on which the said petition was filed, the petitioning creditors, James McCreery & Company and others, represented by their attorney, Eugene G. Kramer, Esq., made a written application to this court for an injunction, and upon said application obtained an order directing the said Edward Howard Clarke and the sheriff of the county of New York to show cause why the latter should not be enjoined from paying over certain moneys in his hands which he had made under an execution issued in favor of said Clarke against said Kenney out of the supreme court of the State of New York to the said Clarke
56 until the appointment of a trustee for said Kenney in said bankruptcy proceedings, and restraining him in the meanwhile from making such payment. Said order to show cause was never served upon said Clarke, nor upon any attorney representing him; but thereafter deponent appeared upon the hearing of said application for said injunction order, especially on behalf of said Clarke for the purpose of opposing the granting of such injunction order, and for no other purpose, as appears from the affidavit which

deponent presented upon the hearing of said application, and said Clarke has never been made nor has he made himself a party to said bankruptcy proceeding-, or any of them, in any other manner or for any other purpose. Deponent supposed from the language of the said injunction order and of the affidavits upon which the same was based, and from the argument of counsel for the petitioning creditors made upon the hearing, and from the briefs of said counsel presented upon said hearing, that the object of the petitioning creditors was simply to obtain an injunction restraining the sheriff from paying over said money to said Clarke until the trustee for said Kenney should, after his appointment, have a reasonable opportunity of contesting in a plenary suit at law or in equity the rights of said Clarke to said sum of money, and of asserting the rights of the trustee to the same, and laboring under such supposition, deponent did, in his affidavit which he submitted as aforesaid, and in his argument and brief submitted to the court upon the hearing, confined himself only to such facts and such points as he deemed were proper to show that the court should not issue such injunction order, and did not go at all into the merits of the claim of said Clarke to said fund, reserving such matters for adjudication in the aforesaid suit which he supposed said trustee would bring, and which he himself intended to bring in case such step were necessary to procure the payment of said money by the sheriff to said Clarke. The court, evidently
57 laboring under a misapprehension as to the nature of matters submitted to it for adjudication and as to its powers and jurisdiction in the matter of the said order made by it on July 20, 1899, not only restrained and enjoined the said sheriff from paying over said moneys to said Clarke until the further order of the court, but it also went further and made a peremptory order directing the payment by said sheriff to said trustee, thereby finally adjudicating the rights of the respective parties, although the same had not been, as aforesaid, submitted to it for decision for the same reason as deponent is informed by the counsel for such sheriff and believes, the said sheriff made no opposition to said motion, although his concern for his own interest should have permitted him to do so, inasmuch as he was under a duty as an officer of the supreme court, to pay over the money in his hands to the execution creditor, Clarke, for whom he had made the same, or in the alternative, to other creditors for whom, as deponent is informed and believes, — held attachments and executions against the said Kenney, and the said sheriff was thereby by the said order placed in the position of being under a double liability to said Clarke and to the said trustee, and of being subject to proceedings for contempt for disobeying the said order of this court on the one hand, or any order which the supreme court may make, and which it has jurisdiction and power to make directing him to pay said money over to the said execution creditor, Clarke, on the other.

Deponent further says that before the appointment of the present trustees, Wilbur Larremore, Esq., and shortly after the election of his predecessor, Noah Davis, Esq., deponent on behalf of his client,

Edward Howard Clarke, commenced a suit in equity in the circuit court of the United States for the southern district of New York against the said sheriff and against the said Noah Davis, as such trustee, for the purpose of determining the rights of the re-
58 spective parties to said fund, and said suit is still pending and undetermined, and said sheriff has been served with process to appear and answer therein. That said Noah Davis was not served with such process because he did not thereafter qualify as such trustee, the fact of his not having qualified not being known to this deponent at the time of the commencement of said suit, and this deponent is about to apply in said suit, by means of a supplemental bill, for an order that the said Wilbur Larremore, Esq., be made a party defendant in the place and stead of the said Noah Davis.

In his bill of complaint in said suit the said Clarke sets up, among other things, that the personal property which was levied on by said sheriff under said execution in favor of said Clarke was not the individual property of said Kenney, but was the partnership property of a firm composed of said Kenney and one Leon Abbett, and that the debt upon which he obtained his judgment and the execution thereunder was a firm debt of said Abbett and Kenney, and that the trustee appointed in this proceeding is the trustee of said Kenney individually, and as such has no right or title to any of said goods or the proceeds thereof. Said bill in equity further sets up that the suit in which said Clarke obtained his said judgment was not begun within four months prior to the time when a sufficient number of creditors had joined for the purpose of making a valid petition in bankruptcy, and that consequently the said judgment and execution were not vacated by said bankruptcy proceedings. Said bill in equity further sets up that the money in the hands of the sheriff constitutes a debt from the said sheriff to the said Clarke by operation of law, and that consequently in the construction of the bankruptcy act which has operated to decide said indebtedness and compel the sheriff to pay over the said money to the said trustee would deprive the said Clarke of his property without due process of law, and would make the said bankrupt
59 act unconstitutional, and null and void. None of the aforesaid grounds were presented to this court for decision and adjudication either by facts set forth in the contesting affidavit of deponent or in any argument made by him upon the hearing of said application for an injunction order by reason of the fact, as before stated, that deponent did not suppose that the rights of his client to this fund were involved in said proceedings, and by reason of the fact, as deponent claims, that the court had no jurisdiction to adjudicate in such matters in this proceeding, deponent intending to reserve said matters for adjudication in the suit which he intended to bring, and which he did thereafter bring as above stated.

Deponent further says that the order as it now stands will embarrass the said Clarke in the prosecution of his suit in equity, as it will apparently seem that the matters presented for adjudication in said suit have already been passed upon by this court, whereas, in

point of fact, it has not been presented to the court and has not been passed upon by the court.

Deponent further says that he has been informed by the attorney for the sheriff, Burritt S. Stone, Esq., that he intends to apply in the aforesaid suit for an order authorizing the said sheriff to pay the money in his hands into said United States circuit court to await and abide the result of said suit for the purpose of relieving the said sheriff from any further responsibility or liability in the matter; and deponent states that he has informed Mr. Stone that he does not intend to oppose said motion, and deponent further states that he will not oppose the granting of said motion.

Deponent further states that such money coming into court, into the hands of the proper officer, will be perfectly safe as far as the interests of the said Clarke or of the said trustee are concerned, and that deponent intends to push said suit promptly, and that
60 the interest of the said estate of Kenney will not suffer by the granting of the application hereby made, because the trustee cannot, as a prudent man, safely pay out such moneys or any part thereof to any creditors of the estate until it has been determined in said suit whether the same belongs to said Clarke or to the said trustee.

GEORGE BELL.

Sworn to before me this 14th day of October, 1899.

[SEAL.] MAX BERING,
Notary Public, N. Y. Co.

(Endorsed:) Filed Nov'r 25, 1899.

In the District Court of the United States for the Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt. In Bankruptcy.

Whereas, James McCreery, Thomas Rosevear and James Crawford McCreery, composing the firm of James McCreery & Co., of the city of New York, the Automatic Fire Alarm and Extinguisher Co., of said city, and Frank H. Beltair, of the city of Jersey City, New Jersey, did on the 13th day of April, 1899, present their petition to this court, praying that the above-named Raymond W. Kenney might be adjudged a bankrupt, and thereupon obtained an
61 order to show cause why the sheriff of the county of New York, his agents, attorneys and servants, should not be restrained from paying over a certain sum of money in the hands of said sheriff to Edward Howard Clark, at whose instance an execution against the property of said Raymond W. Kenney had theretofore been issued to said sheriff upon which said sum of money had been collected, which order to show cause contained a provision that said sheriff should be restrained until the hearing and decision of said motion and the entry of an order thereon from paying over said sum of money; and the bankrupt having answered said petition of

James McCreery and others, and the issue raised having been tried before this court, and the petition of Philip Klein to have said Raymond W. Kenney adjudged a bankrupt, having been presented to the court on the 15th day of June, 1899, and the bankruptcy having been adjudged:

Now, therefore, upon reading the said petition of James McCreery and others and the said petition of Philip Klein filed respectively on the 13th day of April, 1899, and the 15th day of June, 1899, and upon reading and filing the aforesaid order to show cause dated April 13, 1899, and the affidavits of Hanford Crawford, Eugene G. Kremer, George I. Woolley and William B. Ellison, all verified the 13th day of April, 1899, and duly authenticated copies of the affidavits of William B. Ellison and Thomas Wilmot Wood, verified respectively on the 6th day of March, 1899, and the 18th day of March, 1899, annexed to said order to show cause, and proof of the due service of said order to show cause and affidavits upon the sheriff of the county of New York, and upon Messrs. Horwitz & Samuels, attorneys for the said bankrupt; and the answering affidavit of George Bell, verified the 5th day of July, 1899; and after hearing Eugene G. Kremer, of counsel for the petitioning creditors, in support of said motion, and George Bell, of counsel for Edward Howard Clark, in opposition thereto, and due deliberation having been
62 had thereon, and upon motion of Eugene G. Kremer, attorney for the said petitioning creditors, it is

Ordered, that the sheriff of the county of New York, his agents, attorneys and servants, be and they hereby are enjoined and restrained from paying over to Edward Howard Clark, his attorneys, agents and servants, or to any other person or persons, except a trustee or trustees of the estate of the above-named bankrupt duly appointed herein, a certain sum of money now in the hands of said sheriff by virtue of a writ of execution heretofore issued upon a judgment in favor of said Edward Howard Clark against the said Raymond W. Kenney, or any part of said sum, until the further order of the court in the premises, and that the said Edward Howard Clark, his agents, attorneys and servants be and they hereby are enjoined and restrained from receiving the said sum or any part thereof until the further order of the court in the premises; and it is further

Ordered, that the sheriff of the county of New York be and he hereby is directed to pay over the said sum to the trustee or trustees of the estate of said Raymond W. Kenney upon the demand of such trustee or trustees upon the appointment and qualification of such trustee.

Witness, Honorable Addison Brown, judge of the said court and the seal thereof, at the city of New York, in said district, on the 20th day of July, A. D. eighteen hundred and ninety-nine.

[L. S.] ADDISON BROWN.

(Endorsed:) Order for injunction. Filed July 21, 1899.

63 District Court of the United States for the Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

SIRS: Please take notice, that upon the annexed petition of Wilbur Larremore, as trustee of Raymond W. Kenney, bankrupt, and upon the petition of James McCreery, Thomas Rosevear and James Crawford McCreery and others, filed herein on the 13th day of April, 1899, why the said Raymond W. Kenney should not be adjudged a bankrupt, and upon the order issued upon the said petition, and upon other affidavits upon the said 13th day of April, 1899, requiring said Kenney, Thomas J. Dunn, sheriff of the county of New York, and Edward Howard Clark, to show cause why the sheriff should not be enjoined and restrained from paying over the proceeds of the sale of property in his hands under an execution issued to him by said Clark, and upon the answer of said Kenney, and upon the testimony taken upon the trial of the issue raised by said petition and said answer in said proceeding on the 15th day of June, 1899, and the objections filed by the attorneys for said Kenney on the 19th day of June, 1899, and the order adjudicating the said Raymond W. Kenney a bankrupt, filed on the 12th day of July, 1899, and upon the order enjoining the said sheriff from paying out said moneys, and directing him to pay the same to the trustee or trustees of the estate of said Raymond W. Kenney upon the demand of such trustee or trustees, upon the appointment and qualification of such trustee, filed on the 20th day of July, 1899, and upon the
64 order conditionally staying the proceedings under said order of the 20th day of July, 1899, filed on the 15th day of August, 1899, and upon the testimony taken before the Hon. Ernest Hall, referee, on the examination of the bankrupt before him, the said trustee will apply at the stated term of the district court of the United States for the southern district of New York, to be held at the United States court-house, in the county of New York, on the 25th day of October, 1899, at half past ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order that so much of the right under the judgment obtained by said Clark against said Kenney for $20,906.66 on the 6th day of March, 1899, and the levy thereunder made by said Thomas J. Dunn, sheriff of the county of New York, under the execution issued to him upon the said judgment as may be proper, be preserved for the benefit of the estate of said Raymond W. Kenney, bankrupt, and that the same pass to and shall be preserved by the trustee for the benefit of said estate, and directing such conveyances as shall be necessary to carry its determination into effect, and especially directing said sheriff to pay over forthwith the sum of money in his hands as the proceeds of such sale, namely, the sum of $12,451.09, to the said

trustee, and giving the said trustee such other and further relief as to the court may seem just.

Dated New York, October 20, 1899.

STICKNEY, SPENCER & ORDWAY,
Attorneys for Wilbur Larremore, Trustee.

To Thomas J. Dunn, Esq., sheriff of the county of New York; George Bell, Esq., attorney for Edward Howard Clark; Horwitz & Samuels, Esqs., attorneys for Raymond W. Kenney, bankrupt; Eugene G. Kremer, Esq., attorney for the petitioning creditors; William B. Ellison, Esq., attorney for Leon Abbett, creditor.

65 District Court of the United States for the Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

To the district court of the United States for the southern district of New York:

The petition of Wilbur Larremore, as trustee for Raymond W. Kenney, bankrupt, respectfully shows as follows:

First. Your petitioner was duly appointed trustee of the estate of Raymond W. Kenney, bankrupt, at the meeting of the creditors of said bankrupt, held at the office of the Hon. Ernest Hall, referee, on the 26th day of September, 1899, and his appointment was at that time approved by the said referee, and his bond fixed in the sum of fifteen thousand dollars. Thereafter your petitioner duly received notice of said appointment from said referee, and accepted the same, and thereafter he executed and procured to be approved and filed his bond in the sum of $15,000, and duly qualified as such trustee.

Second. Your petitioner is informed and verily believes that this proceeding was commenced by the filing on the 13th day of April, 1899, of a petition made by James McCreery, Thomas Rosevear and James Crawford McCreery, composing the firm of James McCreery & Company, the Automatic Fire Alarm and Extinguisher Com-

66 pany, Limited, and Frank H. Beltair, to have Raymond W. Kenney adjudged a bankrupt, and thereafter the said Kenney appeared in said proceeding and filed an answer to said petition.

On the same day, namely, the 13th day of April, 1899, an order was made upon the foregoing petition and upon affidavits of various persons, requiring the bankrupt, Raymond W. Kenney, Thomas J. Dunn, Esq., sheriff of the county of New York, and Edward Howard Clark, to show cause on the 18th day of April, 1899, why the sheriff should not be enjoined and restrained until the appointment of a trustee in bankruptcy or the further order of the court from paying over the proceeds of a sale of property of the said Raymond W. Kenney then in the hands of said sheriff, under an execution against the property of said Raymond W. Kenney, which had theretofore been issued to said sheriff by said Clark, and why the petitioners should not have such other and further relief as to the court might seem just. The return of the said order to show cause was adjourned

from time to time until the hearing upon the said petition to have the said Raymond W. Kenney adjudged a bankrupt.

Thereafter the issues raised by said petition and the answer of said bankrupt were tried before this court. Upon the said trial the petitioning creditors appeared by Eugene G. Kremer, Esq., as their attorney, and the bankrupt appeared by Horwitz & Samuels, Esqrs., his attorneys. In the course of said trial, and on the 15th day of June, 1899, Philip Klein filed a petition that he be permitted to join in the original petition filed, and this court on the 16th of June, 1899, decided that an additional creditor having been joined as petitioner, no adjudication would be made unless objections were made and noticed for the 21st of June. On the 19th day of June, 1899, objections to the adjudication were so filed by the attorneys for the bankrupt. These objections were based upon the fact that one Leon Abbett was shown to be a partner of the bankrupt, and that
67 therefore the said Raymond W. Kenney could not be adjudged a bankrupt alone. On the 5th day of July such objections were withdrawn, and on the 12th day of July, 1899, an order was made adjudicating that said Kenney was insolvent on the 13th day of April, 1899, and further adjudicating him to be a bankrupt, and referring the matter to Hon. Ernest Hall as referee.

On the 20th day of July, 1899, the said court made an order upon the said petition praying that the above-named Raymond W. Kenney might be adjudged a bankrupt, and upon the said order to show cause why the sheriff of the county of New York should not be restrained from paying over the sum of money in his hands collected upon said execution issued by Edward Howard Clark, and upon said adjudication, and after hearing Messrs. Horwitz & Samuels, as attorneys for said bankrupt, and Eugene G. Kremer, Esq., as counsel for the petitioning creditors, and George Bell, Esq., of counsel for Edward Howard Clark, enjoining the said sheriff from paying over the said sum of money in his hands to said Edward Howard Clark, or to any other person or persons except to the trustee or trustees of the estate of the said bankrupt, and enjoining the said Edward Howard Clark from receiving the said sum, or any part thereof, until the further order of the court, and directing the said sheriff to pay over the said sum to the trustee or trustees of the estate of said bankrupt upon the demand of such trustee or trustees, upon the appointment and qualification of such trustee.

Thereafter the said Edward Howard Clark filed a petition for review of the said order in the circuit court of appeals of the United States for the second circuit, and made an application to this court for a stay of proceedings under said order until the determination of said petition for review; and thereupon this court ordered that so much of said order as directs the payment of said money by the said sheriff to the said trustee be stayed until the determina-
68 tion of said petition for a review, or until the further order of the court, on condition that within ten days from its date, namely, the 14th day of August, 1899, the said Edward Howard Clark file a bond in the sum of $12,751.09, and other sums, to secure

the same. Said Clark, however, failed and omitted to file such bond, so that said stay never became operative.

Third. Subsequent to the appointment of your petitioner and his qualification as such trustee, your petitioner caused a demand to be served upon the said sheriff of the county of New York, notifying him of the fact that he had been duly appointed trustee of the estate of said bankrupt and had duly accepted said trust, and qualified as such trustee, and demanding that he pay over to your petitioner as such trustee the sum of money specified in said order. Theretofore a certified copy of said order had been duly served upon the said sheriff, and your petitioner also caused a certified copy of said order to be duly served upon said sheriff.

The said sheriff has neglected and refused to comply with the direction of said order, and, as your petitioner is informed and believes, intends to refuse to comply with the same.

Fourth. Your petitioner is informed, and verily believes, that on or about the 6th day of March, 1899, and less than four months prior to the adjudication of said Raymond W. Kenney as a bankrupt, said Edward Howard Clark recovered a judgment in the supreme court of the State of New York, against said Raymond W. Kenney for the sum of $20,906.66, and that an execution thereunder was issued to James J. Dunn, Esq., as sheriff of the county of New York, under which the sheriff levied upon certain personal property, consisting of stock, goods, wares and merchandise situated on the premises No. 24 East Twenty-third street, in the city of New York,

69 belonging to said bankrupt. That thereafter and on the 15th day of March, 1899, the said property so levied on was sold by said sheriff at public auction, and the said sheriff received on the said day into his hands as the net proceeds of the said sale the sum of $12,451.09, and that the said sum of money is now in the possession of said sheriff.

Said judgment and levy so obtained by said Clark were obtained against the said Raymond W. Kenney, being then insolvent, within four months prior to the filing of the petition in bankruptcy against him, and your petitioner is advised that as said Kenney has been adjudged a bankrupt, the said judgment and levy are null and void, and that the property affected by the said judgment and levy is wholly discharged and released from the same, and has passed to your petitioner as trustee as a part of the estate of the said bankrupt, unless this court shall order that the right under said judgment and levy shall be preserved for the benefit of the said estate, and that the same may pass to and shall be preserved by the trustee for the benefit of said estate.

Your petitioner is informed and verily believes that a portion of said property was sold to *bona fide* purchasers, for value, but that another portion thereof was sold to certain persons, who purchased the same in the interest of said bankrupt, or in the interest of said Clark, and that said bankrupt or said Clark is now in possession thereof, or of the proceeds thereof. He is so informed, among other sources, by the testimony of said bankrupt, given upon his examination before said referee.

Wherefore, your petitioner prays that this court shall order that so much of the right under such judgment and levy as may be proper shall be preserved for the benefit of the estate of said bankrupt; that the same may pass to and shall be preserved by the trustee for the benefit of said estate; that this court may order such conveyances as shall be necessary to carry its determination into effect, and especially may order the said sheriff to pay over forth-
70 with to your petitioner as such trustee, the sum of money in his hands as the proceeds of the sale of said property so levied upon, namely, the sum of $12,451.09; and that your petitioner may have such other and further relief as to the court may seem just.

And your petitioner will ever pray, &c.

Dated New York, October 20, 1899.

WILBUR LARREMORE, *Petitioner.*

COUNTY OF NEW YORK, } ss:
Southern District of New York, }

Wilbur Larremore, being duly sworn, says: I am the petitioner named in the foregoing petition; I have read the same and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

WILBUR LARREMORE.

Sworn to before me this 10th day of October, 1899.

M. E. KELLEY,

[SEAL.] *Notary Public, New York County.*

(Endorsed:) Petition and notice of motion requiring the sheriff to pay money in his hands to the trustee. Received April 10, 1900.

71 United States District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

COUNTY OF NEW YORK, ss:

George Bell, being duly sworn, deposes and says that he is the attorney for Edward Howard Clarke, one of the respondents in this proceeding, which is based upon the petition of Wilbur Larremore, Esq., the trustee herein for Raymond W. Kenney, praying for an order directing the sheriff of the county of New York to pay over to said trustee certain funds in his hands realized by him under an execution issued out of the supreme court in favor of said Clarke against said Kenney.

Deponent appears in this proceeding on behalf of said Clarke solely for the purpose of objecting to the jurisdiction of the court, and for no other purpose. Deponent further states that on the 23d day of January, 1899, the said Clarke commenced an action in the

supreme court of the State of New York against the said Kenney by the service of a summons on said day on said Kenney to recover the amount of certain notes, and on the 6th day of March, 1899, he recovered a judgment in said action against the said Kenney for the sum of $20,906.86, which said judgment was on said day docketed in the office of the clerk of the county of New York, and an execution thereunder was duly issued to Thomas J. Dunn, one of the re-

spondents herein, as sheriff of the county of New York,

72 and said execution was thereupon duly levied by him upon certain personal property consisting of a stock of goods, wares and merchandise, also fixtures, situated on the premises No. 24 East Twenty-third street, in the city of New York. That thereafter and on the 15th day of March, 1899, said property so levied on as aforesaid was duly sold by the said sheriff, and the said sheriff received on the said day into his hands as the net proceeds of said sale the sum of $12,451.09, and it was the duty of the said sheriff thereupon to pay the same to the said Clarke; but he has failed to do so, and said sum of money is now in his possession.

That on the 13th day of April, 1899, an involuntary petition in bankruptcy was filed against the said Raymond W. Kenney solely and individually in this court, and an order in the said bankruptcy proceedings was made by the Honorable Addison Brown, judge of said court, and served upon the said sheriff, directing him to show cause why an injunction should not issue enjoining him from paying over said money to said Clarke or any other person until the appointment of a trustee in said bankruptcy proceedings and until the further order of the court; and said order to show cause was accompanied by a temporary restraining order, prohibiting the payment of said money to said Clarke, which was also served upon the sheriff. No subpœna was served upon the said Clarke, nor did he appear in the proceeding, nor submit his rights as to the proceeds of said sale to the jurisdiction of the court of bankruptcy aforesaid.

Deponent further says that on the 20th day of July, 1899, the said district court made an adjudication declaring the said Kenney a bankrupt. The sheriff never appeared in said bankruptcy proceedings, but said Clarke appeared upon the hearing of the application for the issuance of said injunction specially for the purpose of opposing the application for said injunction and for no other pur-

pose, and the said court on July 24, 1899, made an order

73 permanently enjoining the sheriff from paying over the said money to Clarke and directing him to pay over the same to the trustee in bankruptcy of said Kenney as soon as he should be appointed and should have qualified, and upon his demand therefor.

Deponent further states that the said order was based solely upon the affidavits upon which the original order to show cause had been granted and on the opposing affidavit of your deponent as attorney for said Clarke, and in the latter affidavit only such facts were set up as tended to show the court had no jurisdiction to issue the temporary injunction prayed for, but deponent not deeming that the right of said Clarke to the aforesaid money as an execution creditor

of said Kenney was involved, did not assert facts tending to sustain his title, and as counsel argued no point save that of jurisdiction and did not argue the matter upon the merits.

Deponent further states that thereafter a motion was made in this court to resettle said order by striking out that portion of the same which directs the payment of the money over by the sheriff to the trustee on the grounds that an application for such payment was not properly embraced in the original application for an injunction order, and said motion for resettlement has been in all things granted, but an order has not yet been signed or entered thereon.

Deponent further states that on or before the 13th day of April, 1899, it was the duty of the said sheriff to pay over the said money in his hands to said Clarke, and deponent, on behalf of said Clarke, demanded that the sheriff pay over such moneys, and he is informed that the said sheriff would have so done if he had not been restrained from making such payment by the said temporary restraining order, and that the application of the petitioning creditors in said bankruptcy proceeding was illegal and unjust, and that the said trustee can take no title to said moneys by reason of the fact that the same were peremptorily kept in the sheriff's hands against
74 the will of the latter and of said Clarke by virtue of said order until the adjudication in bankruptcy of the said Kenney.

And deponent further says that on the 13th day of April, 1899, the said money in the sheriff's hands were the property of the said Clarke by virtue of the proceedings of the said sheriff under said execution and not of the said Kenney, and that if under the proper construction of the act of Congress relating to bankruptcy the said money would pass to the trustee in bankruptcy of the said Kenney upon the adjudication of bankruptcy against the latter, that the said act of Congress is in this respect contrary to the Constitution of the United States, and void, in that it deprives the said Clarke of his property without due process of law.

Deponent further states that—all the times hereinbefore mentioned the said Kenney and one Leon Abbett were in partnership together in the business of manufacturing and selling fur garments at No. 24 East Twenty-third street, in the city of New York, under and by virtue of a partnership agreement executed by the said Kenney and the said Abbett, a copy of which is hereto annexed. Deponent further alleges on information and belief derived from the said Kenney that the aforesaid judgment of the said Clarke, which was recovered on notes made by the said Kenney, was really for a firm debt for which the said Abbett was also responsible, and on information and belief derived from the said Clarke that said Clarke did not know when he brought his said action that the said Abbett was a partner of the said Kenney. Deponent further avers that the goods levied on under the execution of said Clarke belonged to the firm composed of said Kenney and Abbett, and deponent further believes that the said trustee in bankruptcy of said Kenney has not any right or title to the said goods or to the proceeds thereof, he be-

ing a trustee individually of said Kenney and the said goods
75 being firm assets, and the said partnership not being before the court.

Deponent further states that subsequently to the 24th day of July, 1899, Noah Davis, Esq., was appointed trustee for said Kenney in the said bankruptcy proceedings, and thereafter the said Clarke commenced a suit in equity in the circuit court of the United States for the southern district of New York, against the said Davis, as such trustee, and the said sheriff of the county of New York, in August, 1899, praying for a decree declaring *that* the rights of said Clarke to the said money to be superior to the rights of the said trustee in bankruptcy of the said Kenney, and setting out in said bill the grounds set forth above; that a subpœna in said suit was served upon the said sheriff, and he has appeared therein. That the said Davis was never served with a subpœna, and has never appeared nor answered in said suit. That the said Larremore was afterwards appointed trustee for the said Kenney in the place and stead of the said Davis, and has qualified as such trustee, and deponent, on behalf of said Clarke, is about to make a motion in said suit in equity to substitute the said Larremore as a defendant in the place of the said Davis as trustee as aforesaid. Said suit is still pending and undetermined, and deponent alleged that the jurisdiction of the said circuit court of the United States is exclusive of and superior to the jurisdiction of this court to determine the rights of the respective parties to said moneys.

Deponent further alleges on information and belief that the said Leon Abbett is amply responsible for the debts of the aforesaid firm, composed of said Kenney and said Abbett, and owns a large amount of property, and is fully solvent, and that the creditors of said firm can make their debts out of the property of the said Abbett, and will not be injured or delayed in any way by the payment by the said sheriff of the said money in his hands to the said Clarke.

76 Deponent denies, as alleged in the petition of the trustee herein, that a portion of the goods sold at said execution sale were purchased in the interest of said Clarke. Deponent was present at such sale, and knows that a large portion of said goods were purchased by one Wagner, and he is informed and believes that said goods were afterwards sold by said Wagner to a firm composed of the said Clarke and another party, but of which firm said Kenney is not a member.

Deponent further states that prior to the bringing of the action of Clarke against Kenney he became familiar to a considerable extent with the business of said Kenney, and that he then ascertained that the said Leon Abbett took considerable part in assisting in the management of the financial business of said Kenney as a partner enabling the latter to raise funds for the benefit of the business, and that the said Abbett received large sums of money from the said Kenney to the amount of several thousands of dollars out of the proceeds of the business carried on by said firm composed of said Kenney and said Abbett, and received from time to time statements as to the condition of said business, and had access to the books of said business, and

in very many respects conducted himself as a partner in said business.

Deponent further states that the reason why this affidavit is made by himself and not by the said Clarke is, that the latter is without the State, being in the State of Maine, of which he is a resident.

GEORGE BELL.

Sworn to before me this 1st day of November, 1899.

BENJAMIN PATTERSON,

[SEAL.] *Notary Public, N. Y. Co.*

77 United States District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

The respondent Edward Howard Clarke, appearing by his attorney, George Bell, Esq., solely for the purpose of objecting to the jurisdiction of the court in this proceeding and for no other object, avers that the court has no jurisdiction to determine the respective rights of this respondent and of Wilbur Larremore, Esq., as trustee in bankruptcy for Raymond W. Kenney to the sum of money now in the hands of the sheriff of the county of New York, referred to in the annexed affidavit of George Bell, Esq., upon the following grounds based upon the facts set up in said affidavit:

1st. That this respondent has never been a party to the bankruptcy proceeding against the said Kenney, nor any part thereof, nor has he been served with process nor appeared in said proceedings.

2d. That this respondent claims rights adverse to those of the said trustee, and this court has no jurisdiction to determine said rights by summary proceeding or any other manner.

3d. That the money in the sheriff's hands does not belong to the said bankrupt or his trustee, but constitutes a debt by the
78 sheriff to this respondent, and was in that condition before the commencement of the bankruptcy proceedings against the said Kenney and is therefore not subject to the provisions of the act of Congress relating to bankruptcy.

4th. That the said money was made by the sheriff out of the sale of goods, wares and merchandise which were the partnership property of a firm composed of said Kenney and one Leon Abbett, and the trustee has no title to the same, and this court has no jurisdiction over said partnership property, the said Leon Abbett not having been adjudicated a bankrupt, not being a party to said bankruptcy proceedings.

5th. That before the filing of the said petition of the said trustee herein, this respondent had commenced an action against the sheriff of the county of New York and the former trustee in bankruptcy of the said Kenney, the predecessor of the present trustee, for the purpose of determining the rights of this respondent and of said trustee to said money, which suit is still pending and undetermined, and said United States circuit court has therefore obtained prior and exclusive jurisdiction to settle said controversy.

Wherefore, this respondent prays that the petition of the said trustee be dismissed, with costs.

GEORGE BELL,
Attorney for Respondent.

Office and post-office address, 302 Broadway, New York city, N. Y

CITY AND COUNTY OF NEW YORK, *ss:*

George Bell, being duly sworn, deposes and says: That he is the attorney for Edward Howard Clarke, the respondent in the above proceeding; that the statements in the foregoing answer are
79 true of his own knowledge, except as to those stated on information and belief, and as to those allegations he believes it to be true. That the reason why this answer is verified by deponent and not by said Clarke is that said Clarke is at present out of the State, and is within the State of Maine, of which he is a resident.

GEORGE BELL.

Sworn to before me this 1st day of November, 1899.

BENJAMIN PATTERSON,
Notary Public, N. Y. Co.

[SEAL.]

(Endorsed:) Plea to the jurisdiction of the court. Filed April 10, 1900.

(*Copy Agreement.*)

Agreement made and entered into by and between Raymond W. Kenney, of the city, county and State of New York, party of the first part, and Leon Abbett, of the city of Hoboken, county of Hudson, and State of New Jersey, party of the second part:

Whereas, the party of the first part is indebted to the said party of the second part in the sum of twenty-seven thousand eight hundred and twenty-eight and $\frac{83}{100}$ dollars ($27,828.83); and

Whereas, the said indebtedness is represented by certain promissory notes heretofore executed by the party of the first part and delivered to the said party of the second part, and by open account; and

Whereas, the party of the second part is willing and hereby agrees to consider the amount of the indebtedness due to him from the party of the first part as an investment in the business now car-
80 ried on by the party of the first part, that of manufacturing and vending all sorts of furs and other merchandise to such business belonging, at No. 24 East Twenty-third street, in the city of New York:

Now, in consideration of the premises and the sum of one dollar in hand paid by the party of the first part to the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the object and condition of this agreement is such: That the said party of the second part has and by these presents does agree to allow the said sum hereinbefore acknowledged to be due and owing by the party of the first

part to the party of the second part, to remain and continue in the business of the said party of the first part up to and including the fifteenth day of August, 1902, at the risk of the business thus carried on by the said party of the first part.

And it is further agreed between the parties hereto that in consideration of the premises the said party of the second part hereby assumes and agrees to pay any and all promissory notes heretofore delivered by the party of the first part to the said party of the second part, and which notes are either in the possession of the said party of the second part or held by other persons, firms or corporations, having been delivered to such persons, firms or corporations by the party of the second part hereto for the purposes of discount, and the said party of the second part hereby releases the party of the first part from the payment of any and all and each and every of the said promissory notes, subject, nevertheless, to any and all of the covenants and conditions herein contained, it being distinctly understood and agreed by and between the parties hereto that the said promissory notes and each and every of them heretofore delivered by the party of the first part to the party of the second part constitutes a part and portion of the indebtedness hereinbefore referred to,
81 and is included in the said indebtedness of the said sum of twenty-seven thousand eight hundred and twenty-eight and $\frac{83}{100}$ dollars ($27,828.83).

It is further agreed between the parties hereto that on the fifteenth day of August, 1902, the party of the second part shall be entitled to receive, if the business of the party of the first part shall prove profitable, in addition to the amount of indebtedness hereinbefore referred to, a sum equivalent to ten per cent. (10 %) of the net profits of the said business.

It is specifically understood and agreed between the parties hereto, that nothing herein contained shall be deemed, considered or to be construed to constitute a copartnership between the parties, anything herein contained to the contrary notwithstanding.

In witness whereof the parties hereto have hereunto set their hands and seals this 9th day of September, eighteen hundred and ninety-seven.

R. W. KENNEY. [SEAL.]
LEON ABBETT. [SEAL.]

In presence of—
A. H. BERRICK.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 9th day of September, eighteen hundred and ninety-seven, before me personally appeared Raymond W. Kenney and Leon Abbett, to me known and known to me to be the individuals described in and who executed the foregoing instrument and severally duly acknowledged to me that they executed the same.

A. H. BERRICK,
Notary Public, N. Y. Co.

(Endorsed:) Raymond W. Kenney with Leon Abbett. Agreement. Filed April 10, 1900.

82 District Court of the United States for the Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

COUNTY OF NEW YORK, *ss*:

Wilbur Larremore, the trustee appointed by the creditors of Raymond W. Kenney, bankrupt, being duly sworn, says:

I have read the affidavits of Thomas J. Dunn, Burritt S. Stone and George Bell, submitted in answer to my petition for an order requiring the sheriff, Thomas J. Dunn, to pay to me a sum of money in his hands as the proceeds of an execution issued upon a judgment against said Kenney by Edward Howard Clark, and in reply to certain allegations therein, I aver upon information and belief as follows:

I made a written demand upon Thomas J. Dunn for payment of the sum of money referred to in said petition. Such demand was annexed to my former petition to the court to enforce a previous order against said sheriff, with proof of service thereof upon the said sheriff, and I submit the same again herewith. The petition presented by me is verified, and my statement under oath is to the effect that I have been elected trustee in bankruptcy of Raymond W. Kenney, and have qualified as such. Proof of both of those facts is in the records of the referee in this proceeding, the Hon.

83 Ernest Hall, and easily accessible to the said sheriff if he doubts my verified statement. He does not, however, venture to deny the same.

The suit in equity referred to in the affidavit of said Thomas J. Dunn purports to have been commenced by Edward Howard Clark, who is one of the respondents to this petition. It was commenced subsequent to the making of a previous order by this court requiring the sheriff to pay over to the trustee to be appointed the said sum of money. Such order was made upon the appearance of said Edward Howard Clark, and was in fact, I am advised, an adjudication of his rights. He appealed therefrom, although said appeal has not yet been heard. No injunction was issued by such circuit court of the United States, and the action, such as it was, of said Edward Howard Clark, I am advised, was plainly in contempt of the order of this court, and begun after the adjudication of this court as to the rights of the trustee to said fund.

I am ignorant as to what sum of money was left in the hands of the sheriff after the payment of his charges, expenses and fees, or as to what sum of fees for poundage upon the sale of any such property have been turned over to the comptroller of the city of New York, and I ask that any sums for charges and expenses, if claimed by the sheriff, should be presented to this court and the question of their allowance thereof hereafter determined.

I submit, in answer to the position of the sheriff as stated in his affidavit, that in view of the circumstances of this situation, as shown by the papers upon which my application was made, it is impossible that there should be any adjudication hereafter under the suit now pending that the sheriff should be obliged to pay the sum of money in his hands to any one else than the trustee.

The equity suit alleged to be pending in the supreme court, brought for injunction by Leon Abbett, was an action to procure an injunction restraining the sheriff from paying over the said
84 sum of money in his hands to Edward Howard Clark. I am advised and believe that the plaintiff in said action did not ask that the sheriff should pay the said sum to the plaintiff in that action. The injunction was refused by the supreme court of New York, but an injunction was subsequently granted in this proceeding by this court, and it is pursuant to that injunction that the sheriff now holds said property and declines to pay the same to said Edward Howard Clark. Moreover, the said plaintiff in said action, as I am advised, will consent to the payment of said sum of money to the trustee.

I am compelled to rely upon the record in this proceeding, upon which my application is made, to refute the statements made in the affidavit of George Bell. It appears from said record that said Edward Howard Clark did appear and submit his rights as to the proceeds of said sale to the jurisdiction of this court. The order entered upon the application to which he refers recites that fact. The trustee also rests upon the said record for a correction as to the subsequent averments of said George Bell as to the proceedings in this court, the partnership of said Kenney and one Leon Abbett, the liability of said Abbett, and so far as the said record shows the said affidavit to be incorrect, the trustee denies the same.

WILBUR LARREMORE.

Sworn to before me this 3d day of November, 1899.

M. E. KELLEY,
Notary Public, New York County.

(Endorsed:) Affidavit in reply. Filed Ap'l 10, 1900.

85 Circuit Court of the United States, Southern District of New York.

EDWARD HOWARD CLARKE, Complainant,
against
THOMAS J. DUNN, as Sheriff of the County of New York, and Noah Davis, Defendants. } In Equity.

To the honorable judges of the circuit court of the United States in and for the southern district of New York:

The complainant herein, Edward Howard Clarke, is a citizen of the State of Maine and resides in the town of Rockland in said State, and brings this his bill of complaint against Thomas J. Dunn, sheriff

of the county of New York, State of New York, and Noah Davis, the said defendants being citizens of the State of New York and residents of the southern district of New York.

And thereupon your orator complains and says that on the 6th day of March, 1899, he recovered a judgment in the supreme court of the State of New York against Raymond W. Kenney for the sum of $20,906.66, which judgment was on said day duly docketed in the office of the clerk of the county of New York, and an execution thereunder was duly issued to the defendant Thomas J. Dunn, as sheriff of the county of New York, and said execution was thereupon duly levied by him upon certain personal property consisting of the stock of goods, wares and merchandise and fixtures situated
86 on the premises No. 24 East Twenty-third street, in the city of New York.

That thereafter and on the 15th day of March, 1899, said property so levied on as aforesaid, was duly sold by the said sheriff at public auction, and the said sheriff received on the said day into his hands as the net proceeds of the said sale the sum of $12,451.09, and it was the duty of said sheriff thereupon to pay the same to your orator, but he has failed so to do, and said sum of money is now in his possession.

That on the 13th day of April, 1899, an involuntary petition in bankruptcy was filed against the said Raymond W. Kenney in the United States district court for the southern district of New York, and an order in said bankruptcy proceedings was made by the Hon. Addison Brown, judge of said court, and served upon the said sheriff, directing the said sheriff to show cause why an injunction should not issue enjoining him from paying over said money to Edward Howard Clarke or any other person until the appointment of a trustee in said bankruptcy proceedings and until the further order of the court, and said order to show cause was accompanied by a temporary restraining order prohibiting the payment of said money to complainant, which was also served upon the sheriff. No subpœna was served upon petitioner, nor did he appear generally in the proceeding, nor submit his rights as to the proceeds of said sale to the jurisdiction of the court of bankruptcy aforesaid.

And your orator further avers that on the 20th day of July, 1899, the judge of said district court made his adjudication, declaring the said Raymond W. Kenney a bankrupt. The sheriff never appeared in said bankruptcy proceedings, but your orator appeared therein by his attorney, especially for the purpose of opposing the application for said injunction and for no other purpose, and the judge of said court on July 24, 1899, made an order permanently en-
87 joining the sheriff from paying over said moneys to your orator, and directing him to pay over the same to the trustee in bankruptcy of the said Raymond W. Kenney as soon as he should be appointed and should have qualified, and upon his demand therefor.

And your orator avers, that said order was based solely upon the affidavits on which the original order to show cause had been granted and on the opposing affidavit of your orator's attorney,

George Bell, Esq., and in the latter affidavit, only such facts were set up by your orator as tended to show that the court had no jurisdiction to issue the temporary injunction prayed for, but your orator, not deeming that his right to the aforesaid moneys as an execution creditor of said Kenney was involved, did not assert facts tending to sustain his title, and his counsel argued no point save that of jurisdiction, and did not argue the matter upon its merits. And your orator was advised by his counsel and believes, that the said honorable judge of the said district court did not have jurisdiction to issue the original restraining order or the final injunction order, or to direct the sheriff to pay over the moneys in his hands to the trustee of the said Kenney.

And your orator further avers, that on and before the 13th day of April, 1899, it was the duty of the defendant, the said sheriff, to pay over the said money in his hands unto your orator, and he is informed and believes, that the said sheriff would have so done if he had not been restrained from making such payment by the said temporary restraining order, and that the application of the petitioning creditors in said bankruptcy proceedings was illegal and unjust, and that the said trustee can take no title to said moneys by reason of the fact that the same were thus peremptorily kept in the sheriff's hands against the will of the latter and of your orator by virtue of said order until the adjudication in bankruptcy of the said Kenney.

And your orator further avers, that on the 13th day of
88 April, 1899, the said moneys in the sheriff's hands were the property of your orator and not of the said Kenney, and that if, under the proper construction of the act of Congress relating to bankruptcy, the said money would pass to the trustee in bankruptcy of the said Kenney upon the adjudication of bankruptcy against the latter, that said act of Congress is in this respect contrary to the Constitution of the United States, and void in that it deprives your orator of his property without due process of law.

And your orator further avers, that at all the times hereinbefore mentioned, the said Raymond W. Kenney and one Leon Abbett were in partnership together in the business of manufacturing and selling fur garments at No. 24 East Twenty-third street, in the city of New York. That the aforesaid judgment of your orator was recovered on notes made by the said Raymond W. Kenney, but the same constituted a firm debt for which the said Leon Abbett was also responsible. That your orator did not know when he brought his said action that the said Abbett was a partner of Kenney. That the goods levied on by your orator's execution, belonged to the firm composed of said Kenney and Abbett, and the trustee in bankruptcy of the said Kenney has not and will not have any right or title to the said goods or to the proceeds thereof.

And your orator further avers, that on the 23d day of January, 1899, he commenced the action in the supreme court of the State of New York, in which he obtained the said judgment by the service of a summons and notice upon the said Kenney, and obtained a judgment therein as above stated on the 6th day of March, 1899.

That the said bankruptcy proceedings were instituted on the 13th day of April, 1899, by three petitioning creditors, to wit, James McCreery & Co., the Automatic Fire Alarm and Extinguisher Co. and James Beltair. That subsequently the said petition was dismissed as to James Beltair, the said United States district court hold-
89 ing that he was not a creditor of said Kenney. That thereupon the said Leon Abbett was substituted as a petitioning creditor, but his application was also dismissed by said court on the ground that he was not competent by reason of his partnership with the said Kenney to join in the said petition. That thereafter and on or about the 14th day of June, 1899, one Philip Klein, claiming to be a creditor of the said Kenney, entered his appearance and joined in said petition. That until said joinder of the said Philip Klein, there was no valid petition filed in said court against the said Kenney, and the same was more than four months after the commencement of your orator's action against the said Kenney, and did not, under the provisions of the act relating to bankruptcy affect the judgment or execution recovered by your *order* against the said Kenney.

And your orator further avers, that he has no adequate remedy at law to try the title to said moneys as between himself and the said trustee, and he further avers, that if the said moneys are paid over by the said sheriff to the said trustee, that it will result in irreparable loss and damage to your orator, inasmuch as the same will be paid out by the trustee in the course of administration of the said bankrupt's estate, and will be utterly lost to your orator.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed and make a full disclosure and discovery of all the matters aforesaid according to the best and utmost of their knowledge, remembrance, information and belief, and full, true, direct and perfect answer make to the matters hereinbefore stated and charged, *and* your orator prays that your honors may grant a writ of injunction issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said sheriff from paying over such money or any part thereof to the said trustee.

90 And your orator further prays, that the defendant, the said Sheriff of the County of New York, may be decreed to pay over the said moneys unto your orator, and that said Noah Davis be decreed to have no title to said money as trustee as aforesaid.

May it please your honors to grant unto your orator a writ of subpœna of the United States of America directed to the above-named defendants, commanding them and each of them, on a day certain to appear and answer this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall

seem proper and required by the principles of equity and good conscience.

GEORGE BELL,
Solicitor for Complainant.

Office and post-office address, 302 Broadway, New York city, New York.

S. LIVINGSTON SAMUELS, *Of Counsel.*

STATE OF MAINE, }
County of Knox, } ss:

Edward Howard Clarke, being duly sworn, deposes and says: That he is the complainant in the above-entitled action; that he has read the foregoing bill of compiaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

—— ——.

Sworn to before me this — day of August, 1899.

—— ——.

91 STATE OF MAINE, }
County of Knox, } ss:

I, —— ——, clerk of the supreme judicial court of the State of Maine for said county, the same being a court of record, do hereby certify that —— ——, before whom the foregoing affidavit was taken, was at the time of the taking of the said affidavit a notary public, residing in said county, and duly authorized by the laws of said State to take and certify the acknowledgment and proof of deeds, to be recorded in the said State, and that said affidavit is taken and certified in all respects as required by the laws of said State; that I am well acquainted with the handwriting of the said —— ——, and verily believe the signature attached to the foregoing affidavit is the genuine signature of said —— ——.

Witness my hand and official seal this — day of August, 1899.

—— ——.

District Court of the United States for the Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

COUNTY OF NEW YORK, ss:

Thomas . Dunn, being duly sworn, says that he is, and at all the time hereinafter mentioned has been, sheriff of the county
92 of New York. That Wilbur Larremore, Esq., the petitioner herein, has never personally demanded of deponent payment of the sum of money referred to in his petition, and has never presented to this deponent legal proof of his being a trustee in bank-

ruptcy for Raymond W. Kenney, nor of his being entitled to the payment of the sum of money mentioned in said petition. That said alleged trustee has never presented to this deponent proof in writing or otherwise that he has been elected trustee by the creditors of said bankrupt, or that such election has been approved by the referee, or that he has been appointed by the court to such office, or that he has ever qualified under such appointment, if the same was made, and deponent has therefore been advised by his counsel that he would have no right to pay over said money to said Wilbur Larremore, Esq., until such proof was made and until such personal demand was made upon him by said trustee.

Deponent further says that he is not familiar with the course of proceedings in the matter of the original application by the petitioning creditors of said Raymond W. Kenney for an injunction herein, having been represented in said proceeding by Burritt S. Stone, Esq., the representative of his attorney, Philip J. Britt, whose affidavit is hereto annexed and to which he begs leave to refer.

Deponent further says that on or about the — day of August, 1899, and long before the time of the alleged appointment and qualification of said Larremore as trustee as aforesaid, he was served with a subpœna in equity in a suit in the circuit court of the United States, southern district of New York, wherein Edward Howard Clarke was complainant and deponent and Noah Davis as trustee in bankruptcy for said Kenney were defendants, alleging substantially that deponent as sheriff of the county of New York had made under execution issued to enforce a judgment recovered in the supreme court of the State of New York by said Clarke against

93 said Kenney for the sum of $20,906.66, a sum of money exceeding $12,000, and that deponent refused upon demand to pay the same over to said Clarke, and prayed for a decree that deponent be enjoined from paying it over to said Noah Davis as trustee as aforesaid, and that he pay the same over to said Clarke. A copy of said bill in equity is hereto annexed. Deponent has appeared by his attorney in said suit, but has not as yet filed an answer to said bill. By said bill it is claimed among other things that the property levied on by deponent under said execution was the firm property of a partnership composed of said Kenney and one Leon Abbett, and was not the individual property of said Kenney, and deponent is advised by his said counsel that it may be decreed in said suit in equity that said Larremore as trustee of said Kenney individually has no right or title to said property or the proceeds thereof, and that if so decreed deponent would then be liable to the demand of said Clarke for said property, or to any one who may show a right to the same derived from said partnership firm.

Deponent further says that before the injunction order was served upon him herein, and as deponent is informed and believes, before any petition in bankruptcy was filed herein, he sold the property, paid certain charges and expenses made or incurred by reason of said sale, and there was left in his hands less the said charges and expenses and his fees the sum of $12,451.09. That the fees for

poundage upon the sale of said property have been turned over to the comptroller of the city of New York, as required by law.

Deponent further says that he has no interest in the said sum of money now in his hands, to wit, the sum of $12,451.09, but that deponent submits that he should not be compelled to pay same now to the trustee in bankruptcy and then be liable to pay it again to some one else. That deponent is amply responsible to any one for the said sum, and that the retaining of said sum in his hands
94 until an application can be made to interplead the parties as heretofore set forth and pay the money into court, will not work any injury that deponent can see to this bankrupt's estate.

He therefore prays that the petition of the said alleged trustee be dismissed and that he be discharged, with his costs, and for the reason stated in the affidavit of Burritt S. Stone hereto annexed he prays that the order made herein on the 20th day of July, 1899, referred to in said petition, be resettled and modified by striking out that portion of the same which directs deponent to pay over the said sum of money to the trustee or trustees of the estate of said Kenney upon their demand and upon appointment and qualification as such trustee and for such other and further relief as may be just and proper.

Deponent further says that an equity suit is pending in the supreme court brought for an injunction by Leon Abbett against various parties, including this deponent. That it may be that said action could be discontinued, but it has not yet been discontinued, and if prosecuted a judgment may be entered therein directing this deponent to pay said sum over to parties other than the trustee in bankruptcy.

Deponent further says that he has in his hands and had before the filing of the petition in bankruptcy against the said Kenney an attachment against said Kenney in favor of one Leon Abbett issued out of the supreme court of the State of New York, for a sum of money more than sufficient to exhaust the said sum in hand, and executions at the suit of various other judgment creditors against said creditor, and deponent is advised by his counsel that he cannot safely pay over said money to said trustee unless said attachment and judgment creditors are made parties to and are bound by said order.

THOMAS J. DUNN.

Sworn to before me this 24th day of October, 1899.

FREDERICK GREEN,
Commissioner of Deeds, N. Y. County.

95 District Court of the United States for the Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

COUNTY OF NEW YORK, *ss.*:

Burritt S. Stone, being duly sworn, says: That he is an attorney and counsellor at law and the representative of Philip J. Britt, the attorney for Thomas J. Dunn, as sheriff of the county of New York. That the injunction order, dated April 13, 1899, which was issued when the petition in bankruptcy was filed against Raymond W. Kenney, was served upon said sheriff, and deponent represented him in said proceeding. That upon the return day of said order deponent appeared in court for that purpose, but the same was adjourned to an indefinite time, and deponent was informed by Eugene G. Kramer, Esq., attorney for the petitioning creditors, that he would notify him when the proceeding would come up for hearing. That deponent never received such notice and never attended any further to oppose the said application, not knowing that the same was being proceeded with by said petitioning creditors.

Deponent further says that on or about the — day of August, 1899, the said sheriff was served with a subpœna in equity to appear and answer a bill in equity filed against him and Noah Davis

96 as trustee in bankruptcy for said Kenney by Edward Howard Clarke, a judgment and execution creditor of said Kenney. Said bill was never served upon said sheriff, and only came to the notice of said sheriff and deponent a few days ago. A copy of said bill is hereto annexed. By the allegations of said bill it appears that the sum of money which is in controversy herein is the proceeds of an execution sale of property belonging to a partnership composed of Raymond W. Kenney and Leon Abbett, and that consequently the said Wilbur Larremore, as trustee in bankruptcy of said Kenney individually has no right or title to the said sum of money.

It further appears from the allegations of said bill that said property so levied on as aforesaid had been reduced to money and was in the sheriff's hands, and he held the same as a debt to the said execution creditor, Clarke, long before the filing of said petition in bankruptcy against the said Kenney.

It further appears from the said bill in equity that the said bankruptcy proceedings were as a matter of law filed by a sufficient number of creditors more than four months after the commencement of the action in which the said Clarke recovered judgment against the said Kenney in the supreme court of the State of New York.

For these and other reasons deponent believes that the circuit court of the United States may decide in the suit now pending before it between said Clarke, as complainant, and the said sheriff and the trustee of Kenney as aforesaid as defendants, that the said Clarke had rights superior to those of the said trustee, and *any* de-

cree that the said sheriff should pay over the said money to the said Clarke, and deponent fears that the order of this court directing him to pay over said money to said trustee would not be a protection to him against the consequences of a violation on his part of the said decree.

97 In order to avoid these consequences, deponent intends to apply in said suit on behalf of said sheriff for an order interpleading the said Larremore as trustee as aforesaid with the said Edward Howard Clarke and for leave for the said sheriff to pay the said money into the said court to abide the event of said suit and discharge said sheriff from any further liability therein.

Deponent further says that if he had known that the petitioning creditors of Raymond W. Kenney had by their application for the injunction order, dated April 13, 1899, desired to obtain an order directing said sheriff to pay over said money to a trustee when appointed, he would for the protection of said sheriff and in his behalf have opposed the granting of said order. The original order to show cause why such injunction should not issue contained no intimation that said petitioning creditors desired anything further than an order enjoining the sheriff from paying over the said money to the said Clarke.

Deponent further says that said order will interfere with the proposed action of said sheriff in obtaining the order of interpleader aforesaid, and of paying the said money into the United States circuit court, and he therefore asks that the final injunction order referred to in said petition, made July 20, 1899, be so modified or resettled as to strike out the portion which directs the payment of said money to the said trustee as aforesaid.

Deponent further says that the sheriff has no interest in said moneys other than to be protected from liability to pay the same more than once, and that the rights of the parties will be amply protected by the decree to be made in said equity suit, and that the trustee will not be injured by the aforesaid modification of said order. That even if said moneys are paid over by the sheriff to said trustee that the latter would not, in deponent's opinion, be safe in

98 paying the same out in the course of administration of said bankrupt estate to any creditor until the final determination of said equity suit.

BURRITT S. STONE.

Sworn to before me this 25th day of October, 1899.

NATHAN METZGER,
Com. of Deeds, N. Y. C.

(Endorsed:) Affidavits submitted on behalf of sheriff in opposition to motion. Filed Oct. 16, 1899.

It is hereby stipulated that the following is a summary of the testimony of Raymond W. Kenney, taken on his examination by his

creditors at their first meeting, after his adjudication, before Hon. Ernest Hall, referee in bankruptcy, in this proceeding.

STICKNEY, SPENCER & ORDWAY,
Attorneys for Wilbur Larremore, Trustee.
PHILIP J. BRILL,
Att'y for Thomas J. Dunn, Sheriff, &c.
EUGENE G. KREMER,
Attorney for Petitioning Creditors.
GEORGE BELL,
Attorney for Ed. Howard Clark.
WILLIAM B. ELLISON,
Attorney for Leon Abbett, Jr.
HORWITZ & SAMUELS,
Attorneys for Raymond W. Kenney.

The bankrupt appears by Messrs. Horwitz & Samuels, his attorneys, and a number of other creditors appear by their respective attorneys.

Hon. Noah Davis having been elected trustee, but declined to serve, Mr. Wilbur Larremore is nominated trustee of the bankrupt's estate and unanimously elected as such on the 26th day of September, 1899.

The bankrupt, being examined, testified: That his attor-
99 neys in this proceeding are Horwitz & Samuels; that Mr. George Bell was his counsel in some matters but is not now, and that those matters were terminated when the petition in bankruptcy was filed; that there were pending at that time one or two matters in which Mr. Bell was his attorney. Mr. Edward Howard Clark is his wife's father.

During the year 1898 witness did a general fur business, manufacturing and selling wholesale and retail; did not speculate in stocks or play at cards. As to the property which he had at the time of the filing of the petition in bankruptcy, he testified: "I made a statement for Mr. Abbett that showed exactly what we had; we took stock for him and everything was upon that statement, which showed exactly how we stood to a dollar." He testified before Judge Brown as to what he had at that time and that testimony is correct.

Mr. George Bell represented him in some matters in January, 1899. Mr. Bell served upon him the summons and complaint in the case of Edward Howard Clark against him; that the plaintiff's attorney in that action was Alexander Melhado; that the notes upon which that suit was brought had been for four or five years before the beginning of the suit in his safe in a sealed package belonging to Mrs. Kenney; he never opened that package; that he took that package out of the safe and handed it to Mrs. Kenney when she asked for it; that his book-keeper could show the account in his books between Mrs. Kenney and himself, or counsel for creditors was at liberty to take the books and find it out.

The notes sued on in January, 1899, would show for themselves at the time of their date, how long he had owed them. He could not state from recollection how long he owed the money, but Mr.

Abbett could; he did not know without having the notes to refresh his memory.

Counsel for creditors offered in evidence a letter dated November 21, 1894, written by Kenney to Henry F. Gillig, stating that
100 he was worth over and above all his obligations, apart from his wife's estate and the good will of his business, $60,000; witness testified that such statement was correct at the time it was made.

Witness knew Otto Wagner very well; that he is not connected in business in any way with Otto Wagner; was present at the sheriff's sale of the property formerly owned by him; that he assisted Otto Wagner in bidding at the sheriff's sale and Wagner bought about $5,000 worth. The worth of the goods he bought was $15,000, but that he paid $5,000 for them; that those goods after they were purchased were shipped to Mr. Wagner's store and Wagner sold them to different people and sold part of them to the firm by whom witness was employed at the time of the present examination; that he had helped Wagner ship them to his store; Wagner checked them off with his bill just the same as he would any other bill of goods that he purchased and put them in his place on sale the same as any other goods. Witness has been in his store and saw them and knows he sold them to different parties and sold part to the firm by whom witness is now employed, which is known as "Kenney" at 275 Fifth avenue, and is composed of Edward Howard Clark and William W. Hart. Witness is manager of the firm of Kenney and has a power of attorney from Clark to buy, sell and do anything for him; that witness purchased back from Wagner about $3,800 worth of the purchase made by Wagner and which was afterwards delivered to the firm of Kenney, and he paid Wagner a very small per cent. of profit on the purchase; that the consideration of the notes which he gave to his wife was cash on the date when they were drawn during the year 1894, which money was all put into his business. It was in the neighborhood of $15,000; that he never paid Mrs. Kenney any money on account of the loan, but paid out some money for her which was charged against her which was coming from her grandmother's estate; he had not made payments to Mrs.
101 Kenney on that loan, but had paid out amounts for her in the neighborhood of four hundred or five hundred dollars for bills which she contracted; this was all he gave her since 1894, except which was his legal duty to do to support her. He didn't pay her one dollar. He did not hand her one dollar in 1895 or 1896 or 1897 or 1898. He never paid her any interest from 1894 to 1898, nor gave her any security except the notes. She transferred those notes to her father, Mr. Clark, and Mr. Clark brought suit against him.

He did not defend. Mr. Abbett agreed to hold it off, and he didn't do it. The suit was brought about the end of January, and he was served therein. Mr. Clark's attorney in the action was not witness' attorney. At that time witness' attorney served him with the papers. After the suit was brought he went down to the attorney's office and told him there was no necessity for bringing that suit; that they were perfectly solvent, and were not pressed but only by

one or two creditors for very small amounts. He doesn't live with his father-in-law, and does not know when his wife transferred the notes to Clark; he didn't ask her.

After the suit was brought, he spoke to his wife and got her to write to her father and get him to hold off. There was no conversation between his father-in-law and himself in reference to the bringing of the suit. There was no conversation between his wife and himself until after the papers were served.

The notes were not taken out of his safe; there was a package belonging to Mrs. Kenney containing papers relative to two estates in which she was interested, and her attorneys had to have some facts, and all her papers were contained in this package, which was marked "Helen L. Kenney, personal," and her bills and notes were in this package. This was in July or August, 1898.

102 Previous to the suit Mr. Clark did not make a demand for the money, but made a demand for the interest on it; he had no arrangements with Mr. Clark relative to the obtaining of this judgment and the sale of these goods. He did not know anything about the bringing of this suit, and had no transaction or conversation relative to the bringing of this suit until he was served with the papers. His wife didn't know anything about it.

He is employed by the Kenney Company; he does not sign checks. W. W. Hart signs the checks. Mr. Clark was never in the fur business before; that he made the arrangements with Mr. Clark and Mr. Hart for starting the business in the latter part of June, 1899; he did not have control of any of this merchandise; he didn't take charge of the sale of this merchandise which Mr. Wagner sold privately. He has a power of attorney from Clark to be used and put on record, both in Maine and New York, of his interest in the business. Mr. Clark never comes into the store; the other partner comes in almost daily. Mr. Clark put into the business $1,500 in money as capital, and bound himself to put in a considerable sum. He put in no merchandise.

Witness bought the goods which came into the present business for cash, and Mr. Hart gave him a check to pay for it. There was no property purchased for the present business until the business was actually run. He purchased the goods in the business from various merchants about New York city. The goods which he bought from Wagner was in his store, upstairs in view, just the same as his other goods. The goods which he bought from Wagner were not skins, but manufactured goods, speculative goods which he had manufactured himself. They sold a year ago, at about thirty cents on the dollar at what they were actually worth, and he purchased them back from Wagner at about fifty cents on the dollar at what they were worth a year ago.

In his old business he employed a great many people, but only retains two of them now. He does the employing and discharging in the business, but he has only two employees.

103 He has not the same book-keeper that he had before. Mr. Hart holds the lease of the store and made the arrangements for hiring it. Witness looked the place over and figured the goods it

would take to get it into shape and laid it out on paper; he had no interviews with the people who leased the property. Witness is the present book-keeper. The business belongs to Hart and Clark. He gets a salary of $50 a week, nothing else outside of that; no commissions. The business has just been started; it has not been open but one week. He made his arrangements with Clark, and has a contract of employment; the papers were drawn up for the firm by Mr. Hart's attorney, Mr. Furber. He drew up the papers for Mr. Hart and the engagement by Hart and Clark of himself.

Witness assigned to Clark accounts amounting to $7,000. Witness didn't collect a dollar of those accounts. None of the debtors have paid, because the debtors did not know whom to pay to.

Mr. Bell represented Mr. Clark for the purpose of collecting these accounts; he has never reported to witness about it. There was no consideration for the assignment of the accounts by him to Mr. Clark other than the notes held by Mr. Clark on which Mr. Clark had obtained judgment against him; that he does not know whether Mrs. Kenney received any consideration for the transfer by her to Mr. Clark of the notes upon which Clark sued and that he had no conversation with her, or with Mr. Clark, or with Mr. Bell in regard to any consideration being received by her from Mr. Clark for those notes. Mr. Clark always stops with witness when he is in the city and witness and his wife live in the same house. Mr. Clark resides in the city of Rockland, Maine; Clark was not in this city in January, 1899, but was in February or March, 1899. Witness was present in the house but was not in the room when Mrs. Kenney delivered the notes to Mr. Bell. She put them in a sealed envelope and directed them in a letter to Melbado and delivered it to Mr.
104 Bell. Witness was not present but he knew it some time afterwards and asked Mrs. Kenney about it and she told him. Bell came into the house in reference to some matter of the National Bank of Commerce; he came to see him about a matter separate and apart from the notes on which suit was brought by Clark, and witness didn't know until later that Bell had anything to do with that business.

Horwitz & Samuels had been his general attorneys since his former attorney, A. Berrick, died. He employed them in this bankruptcy matter on the day the sheriff sold the stock; he telephoned to Horwitz & Samuels and a young man from their office came to his store and he employed them to save the stock and business. They could not do anything; the sheriff was going on with the sale. He didn't know at the time that Mr. Bell issued the execution on Mr. Clark's judgment, but knows it now. That is the same Mr. Bell who served with him the summons and complaint in that action. Mr. Bell in issuing the execution was not acting for witness but for Mr. Clark. Bell was attorney for him in other proceedings then pending. Witness has paid Mr. Bell money during the year 1899. Witness didn't pay Bell for filing the bill in the circuit court in favor of Mr. Clark. Witness was not consulted in regard to the bringing of the suit and the filing of the bill in the action brought by Clark against Thomas J. Dunn, sheriff of the county of New

York, and Noah Davis. He knew of the suit about the day it was filed, but didn't know beforehand that it was going to be filed, and had no conversation with Mr. Bell about it.

The day before Clark's judgment was taken, Mr. Abbett requested witness to take stock and gave him a detailed account of the business at that time; his book-keeper drew off a statement from the books. The examination of the books was made on Saturday or Sunday before the judgment, namely, March 6th, 1899. He never had an opportunity of showing that statement to Mr. Clark
105 or to Mrs. Kenney. The object of going over the statement and having it accurate was to satisfy Mr. Abbett and Mr. Clark that the business was perfectly solvent and was running all right.

United States District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

I, William B. Ellison, attorney for Leon Abbett, Jr., a creditor of the above-named bankrupt, and also attorney for the said Leon Abbett, Jr., in an action now pending in the supreme court of the State of New York, entitled Leon Abbett, plaintiff, against Edward Howard Clark, Raymond W. Kenney, and Thomas J. Dunn, as sheriff of the county of New York, to restrain the said sheriff from paying out certain moneys in his hands hereinafter mentioned, do hereby consent, on behalf of the said Abbett as plaintiff in the said action in said supreme court of the State of New York, that the moneys in the hands of said sheriff, which are the proceeds of the sale of the goods of said bankrupt seized by the said sheriff under execution issued in a judgment against said bankrupt procured by one Clark, be paid by the said sheriff into the hands of Wilbur Larremore, Esq., duly appointed trustee of the said bankrupt.

Dated New York, November 2, 1899.

WILLIAM B. ELLISON,
Attorney for Leon Abbett, Jr.

(Endorsed:) Consent to payment of moneys by Leon Abbett, Jr. Filed April 10, 1900.

106 United States District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

The respondent, Raymond W. Kenney, by his attorneys, Messrs. Horwitz & Samuels, hereby in accordance with the order of the court herein, dated June 15, 1899, makes the following objections to the proposed adjudication in bankruptcy against him:

First.

The evidence discloses that Leon Abbett is, and was at the date of the act of bankruptcy, alleged in the original petition herein, a copartner with this respondent, and the court has, therefore, no jurisdiction to make an adjudication of bankruptcy against this respondent without including therein the said Leon Abbett and said firm, which was composed of this respondent and the said Leon Abbett.

Second.

All the petitioning creditors herein are joint creditors of the firm which was composed of this respondent and the said Leon Abbett, and the said creditors have, therefore, no standing in court to require an adjudication of bankruptcy against this respondent alone, and without joining the said Leon Abbett as a codefendant with respondent in this proceeding.

107 Third.

The act of bankruptcy alleged in the petition is shown by the evidence to have been an act of bankruptcy of the firm above mentioned, and the property which was subjected to the execution of the alleged judgment creditor, Edward Howard Clarke, has been shown by the evidence herein to be property belonging to the said firm composed of this respondent and the said Leon Abbett.

Fourth.

There is no testimony herein showing that the said Leon Abbett is or was at any time insolvent, and the court has, therefore, no jurisdiction to declare the said firm a bankrupt.

Wherefore, respondent prays that the petition herein be dismissed, with costs, for want of jurisdiction.

HORWITZ & SAMUELS,
Attorneys for Respondent, Raymond W. Kenney.

Office and post-office address, 346 Broadway, New York city, New York.

(Endorsed:) Objections to adjudication filed.

108 At a stated term of the district court of the United States for the southern district of New York, held at the Federal building, in the city of New York, in said district, on the 25th day of November, 1899.

Present: Hon. Addison Brown, judge.

In the Matter of RAYMOND W. KENNEY, Bankrupt.

Wilbur Larremore, Esq., as trustee of Raymond W. Kenney, bankrupt, having presented a petition to this court for an order that so much of the right under the judgment obtained by Edward Howard

Clark against said Raymond W. Kenney for $20,906.66 on the 6th day of March, 1899, in the supreme court of the State of New York, and the levy made by Thomas J. Dunn, Esq., sheriff of the county of New York, under an execution issued to him upon the said judgment, as may be proper, be preserved for the benefit of the estate of said Raymond W. Kenney, bankrupt, and that the same pass to and shall be preserved by the trustee for the benefit of said estate, and directing such conveyances as shall be necessary to carry the determination of this court into effect, and especially directing the said sheriff to pay over forthwith the sum of money in his hands as the proceeds of such sale, namely, the sum of $12,451.09, to the said trustee, and for such other and further relief as to the court may seem just.

And due notice of motion on said petition having been
109 given to Thomas J. Dunn, Esq., sheriff of the county of New York, to said Edward Howard Clark, to said Raymond W. Kenney, bankrupt, to the petitioning creditors in the proceeding to have said Kenney adjudged a bankrupt, and to Leon Abbett, claiming to be a creditor of said Kenney, and all of said persons having appeared upon the said motion, the said Thomas J. Dunn, Esq., by Philip J. Britt, Esq., his counsel; the said Edward Howard Clark, by George Bell and S. L. Samuels, his counsel; the said bankrupt, by S. L. Samuels, Esq., his counsel; the said petitioning creditors by Eugene G. Kremer, Esq., their counsel, and the said Leon Abbett by William B. Ellison, Esq., his counsel.

And the said Edward Howard Clark having moved for an order resettling an order made in this proceeding on the 20th day of July, 1899, whereby the said sheriff was restrained from paying out the said sum of money, and directing him to pay the same to the trustee or trustees of the estate of said Raymond W. Kenney upon the demand of said trustee or trustees, by striking out that portion of the said order which directs the said sheriff to pay over the said sum of money to the trustee in bankruptcy of said Kenney.

And due notice of said motion having been given to the said petitioning creditors, the said trustee and the said sheriff, and the said parties having appeared by their counsel as above stated.

And both of said motions having been brought on for a hearing before this court together; now, upon the petition of Wilbur Larremore, as trustee, verified the 20th day of October, 1899; the petition of James McCreery, Thomas Rosevear and James Crawford McCreery, and others, filed herein on the 13th day of April, 1899, why the said Raymond W. Kenney should not be adjudged a bankrupt, and upon the order issued upon the said petition, and upon other affidavits upon the said 13th day of April, 1899, requiring said
110 Kenney, Thomas J. Dunn, sheriff of the county of New York, and Edward Howard Clark, to show cause why the sheriff should not be enjoined and restrained from paying over the proceeds of the sale of the property in his hands under an execution issued to him by said Clark, and upon the answer of said Kenney, and upon the testimony taken upon the trial of the issues raised by said petition and said answer, in said proceeding on the 15th day of

June, 1899, and the objections filed by the attorneys for said Kenney on the 19th day of June, 1899, and the order adjudging the said Raymond W. Kenney a bankrupt, filed on the 12th day of July, 1899, and upon the order enjoining the said sheriff as aforesaid, filed on the 20th day of July, 1899, and upon the order conditionally staying the proceedings under said order of the 20th day of July, 1899, filed on the 15th day of August, 1899, and upon the testimony taken before the Hon. Ernest Hall, referee, on the examination of the bankrupt before him, and upon the notice of said motion by said trustee dated October 20, 1899, and upon the affidavits of Thomas J. Dunn, verified October 24, 1899, and of Burritt S. Stone, verified the 25th day of October, 1899, and the copy of the bill in equity herein referred to thereto annexed, the affidavit of George Bell, verified the 1st day of November, 1899, the answers of Edward Howard Clark to the said petition of said trustee, each verified the 1st day of November, 1899, the agreement between R. W. Kenney and Leon Abbett dated the 9th day of December, 1897, the affidavit of Wilbur Larremore, the said trustee, in reply to said affidavits verified the 3d day of November, 1899, and upon the written consent of said Leon Abbett that the said sum of money in the hands of the said sheriff be paid to the trustee, and also upon the affidavit of George Bell, verified the 14th day of October, 1899, and the notice of motion of said Edward Howard Clark for said order resettling the order made herein on the 20th day of July, 1899, and after hearing counsel as aforesaid, and upon motion of Stick-
111 ney, Spencer & Ordway, Esqrs., attorneys for the said trustee, it is

Ordered, that said petition of said trustee be and it is hereby granted, and that said motion of said Edward Howard Clark be and it is hereby denied; and it is further

Ordered, that so much of the right under the judgment obtained by said Edward Howard Clark against said Raymond W. Kenney for the sum of $20,906.66 on the 6th day of March, 1899, in the supreme court of the State of New York, and the levy made by said Thomas J. Dunn, sheriff of the county of New York, under the execution issued to him upon the said judgment, as is represented by the proceeds of the sale made by said sheriff under said execution, be and it is hereby preserved for the benefit of the estate of the said Raymond W. Kenney, bankrupt, and that the same pass to and shall be preserved by Wilbur Larremore, Esq., trustee for the benefit of said estate; and it is hereby further

Ordered, that said Thomas J. Dunn, sheriff of the county of New York, be, and he is hereby, directed to transfer, convey and pay over to said Wilbur Larremore, Esq., trustee as aforesaid, or to Stickney, Spencer & Ordway, Esqrs., his attorneys, the said sum of money in his hands as the proceeds of such sale, namely, the sum of $12,451.09, and that all claims of said Edward Howard Clark to said sum of money under said judgment, execution or levy be, and they are hereby deemed transferred and conveyed to said trustee.

ADDISON BROWN.

(A true copy.)
[SEAL.] S. H. LYMAN, *Clerk.*

(Endorsed:) Order directing sheriff to pay trustee. Filed Nov'r 25, 1899.

112 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 23d day of October, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fifth.

[SEAL.] SAMUEL H. LYMAN, *Clerk.*

United States District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY.

In bankruptcy. Stay on execution.

Eugene Kremer, for petitioners.
George Bell, opposed.

BROWN, *J.:*

113 The petition to have Raymond W. Kenney adjudged a bankrupt was filed on April 13, 1899, the act of bankruptcy alleged being, that he had suffered a judgment to be recovered against him by one Clark in the preceding month of March, and had allowed his chattel property to be sold under execution thereunder. On answer and hearing, bankruptcy was adjudged. The sheriff having collected the money upon the execution sale made prior to the filing of the petition, a stay of proceedings was obtained against the payment of the moneys upon the execution by the sheriff, and this stay is now asked to be continued. The stay is opposed by the judgment creditor, who urges that the proceeds are not within the jurisdiction of this court and that they belong to the judgment creditor, citing the cases *In re* Easley, 93 Fed., 419; Henkelman *v.* Smith, 12 N. B. R., 121, and other cases.

I cannot sustain the objection to the stay. The judgment and execution having been obtained and issued but a little more than a month before the filing of the petition, the case falls within the express provisions of section 67 of the present bankruptcy statute, which declares "that all levies for judgment, or other liens obtained through legal proceedings" in such case "shall be deemed null and

void in case he is adjudged a bankrupt." The latter part of this section provides "that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy of the *bona fide* purchaser for value." This proviso leaves no doubt of the intent of this section. A "title" could only be "obtained by a levy" through a sale under a levy; and the proviso means that the *bona fide* purchaser's title shall not be impaired by the fact that as against all other persons the levy is to be deemed "null and void," in case the defendant is adjudged a bankrupt. The proviso is for the protection of the *bona fide* purchaser only; and it clearly shows that the intent of the section is to reach out beyond the levy itself, and to make null and void all that is done under the levy, except as
114 to the title of the *bona fide* purchaser. So far as concerns the judgment creditor, the lien and the levy being null and void, he can take no advantage from it, nor acquire any right to the proceeds. A valid title passing presumptively to the purchaser at the sheriff's sale, the proceeds stand in the sheriff's hands as a mere substitute for the goods, to which the judgment creditor gets no right, but which belong to the bankrupt's estate like the goods themselves.

The provisions of the act of 1867 are so different from those of the present statute on this point as not to be applicable.

The stay is continued, and an order may be taken directing the payment of the moneys to the trustee when appointed.

A. B.

July 7, 1899.

(Endorsed:) U. S. district court, southern district of N. Y. In the matter of Raymond W. Kenney, bankrupt. First opinion of Brown, J.

United States District Court, Southern District of New York.

In the Matter of RAYMOND W. KENNEY.

Stickney, Spencer & Ordway, for trustee.
George Bell and S. L. Samuels, for judgment creditor.
Philip J. Britt, for sheriff.

BROWN, *J.*:

This is mainly a rehearing of the matter decided by me in
115 July last (*In re* Kenney, 95 Fed., 427), upon which an order was entered on July 20th continuing a previous order restraining the sheriff from paying to E. H. Clark, a judgment creditor of the bankrupt, the sum of $12,451.09, the proceeds of a sale on execution of the bankrupt's goods. That order further directed the sheriff to pay those moneys to the trustee of the bankrupt upon his appointment and qualification. The present hearing is upon an application for a resettlement of that order for the purpose of striking out this last clause, on the ground that it was not asked for in the moving papers, and accordingly was not properly considered by

opposing counsel on the former motion, and that the order is in fact beyond the authority of the court. The trustee having in the meantime been appointed and qualified, a further application in his behalf has been made on notice to the sheriff and the judgment creditor, for an order directing the sheriff to pay over the proceeds of the execution sale to the trustee, as previously ordered. Both applications were directed to be heard together.

The objections made to granting the order asked for are principally those raised upon the previous hearing, although they are now more fully elaborated in the briefs submitted, and some further objections are presented requiring consideration.

The petition in involuntary bankruptcy was filed April 13, 1899, and the defendant interposed an answer denying insolvency and the act of bankruptcy alleged. Upon the trial of the issue by the court, although the main facts were found as alleged, an amendment of the petition by the introduction of an additional petitioning creditor was deemed expedient, and an additional creditor having thereafter joined in the petition and further objections thereto being withdrawn by the defendant, he was adjudged a bankrupt on the 12th of July.

116 The defendant was in the fur business in this city, and on March 6, 1899, judgment was recovered against him in the State supreme court by E. H. Clark for the sum of $20,906.66. On the same day execution thereon was issued to the sheriff, under which on March 15th the defendant's stock of goods was sold by the sheriff, realizing the net proceeds of $12,451.09. On April 13th after the filing of the involuntary petition in bankruptcy, the petitioning creditors obtained an order directing the sheriff and said Clark, the judgment creditor, to show cause before this court on April 18th why the sheriff should not be enjoined from paying over any portion of the proceeds of sale until the appointment of a trustee, or the further order of the court; and "why the petitioners should not have such further or different order or relief in the premises as to the court shall seem meet." By this order the sheriff was also restrained from paying over the proceeds until the hearing and decision of the order to show cause. The hearing on this order was postponed by consent of the parties from time to time until the decision of the court on the question of the adjudication in bankruptcy, whereupon the question of a stay was argued and submitted by counsel for the petitioning creditors and by counsel for Clark, the judgment creditor. The latter also submitted an affidavit dated July 5th, from which it appeared that one Leon Abbett had commenced an action in the supreme court against Clark, Kenney and the sheriff, to declare Clark's judgment fraudulent and void, and that a temporary injunction had been therein obtained against the sheriff restraining him from paying Clark the proceeds of said sale, and that this injunction had been vacated on the day the petition in bankruptcy was filed. In the brief then submitted in behalf of Mr. Clark, it was argued that the proceeds of the sale in the sheriff's hands had become the property of Mr. Clark, the judgment creditor, and were no part of the bankrupt's estate over which the court

had jurisdiction; that section 67 applies only to pending process and not to consummated process, or executed process, and
117 that property held adversely by third parties cannot be taken from them except by a plenary suit. In this hearing on the merits, the notice of motion for further relief was sufficient for the order made, if that order was correct.

1. There is no doubt that by the law of this State, moneys collected by a sheriff through a sale on execution are in a certain sense the property of the plaintiff, provided the proceedings are valid (Nelson *v.* Kerr, 59 N. Y., 224; Kingston Bank *v.* Geltinge, 40 N.Y., 391, 395; Wehle *v.* Conner, 82 N. Y., 231), but not completely so, nor subject to levy against him until paid over (Baker *v.* Kenworthy, 41 N. Y., 215; Turner *v.* Fendall, 1 Cranch, 134). But the execution creditor is not entitled to the specific moneys, nor can he maintain any action against the sheriff for not paying them over, until either the return day of the writ of execution has passed, or the sheriff has made return of the writ. Not until then can the creditor have either possession, or the right of possession. The sheriff is not the mere agent of the creditor, but an officer of the law as well, who may pay the money into court along with the return of the writ (Nelson *v.* Kerr, *supra;* Turner *v.* Fendall, 1 Cranch, 134–137).

Under the act 1867, and under the present act, except for the provisions of section 67, the right of the execution creditor to recover these moneys could not have been interfered with in the present case, but since the passage of the act of 1898, every judgment creditor issuing execution and procuring a levy and sale, does so subject to the contingency that his proceedings may be nullified and all the lien or preference that he might otherwise acquire be avoided by a petition in bankruptcy filed against the debtor within four months, followed by an adjudication. Subdivision *f* of section 67 provides not only that the levy, execution, &c., in that case shall be deemed null and void, but that the property affected by the levy shall
118 be deemed wholly discharged and released from the same, and shall pass to the trustee; and further, that

"The court may order the right under such levy to be preserved for the benefit of the estate, and such conveyance thereof to be made as shall be necessary."

Provided that nothing therein shall destroy or impair the title obtained by such a levy by the *bona fide* purchaser for value. This provision, as observed in the previous decision, shows incontestably, as it seems to me, that no preference can be acquired by a levy and sale within four months of filing the petition in bankruptcy; but that though the *bona fide* purchaser at the sale will be protected, the proceeds must stand in lieu of the property sold (*In re* Frank, 95 Fed., 635), and that the judgment creditor's "right under such levy" will pass to the trustee in bankruptcy. By the terms of the act, moreover, the court is expressly authorized to order the "right" of the judgment creditor "under the levy" to be transferred and conveyed to the trustee. This is properly accomplished by ordering the sheriff to pay over the proceeds (*In re* Fellerath, 95 Fed., 121).

Against these clear provisions of section 67, the objections that these moneys belong to the judgment creditor and that the court has no power or authority to order the sheriff to pay them over to the trustee seems to me without force. The cases cited under the act of 1867 are inapplicable, not only in consequence of the different express provisions of section 67 of the act of 1898, but because those decisions themselves are limited to cases of third persons in possession of property, who have at least some color of title, or adverse interest. But Mr. Clark, the judgment creditor, at the time the petition in bankruptcy was filed, was not in possession of those proceeds; nor had he then acquired any right of possession; nor could he then have maintained any action against the sheriff for the recovery of the proceeds, since
119 the execution had not been returned, nor had the time for returning it expired. Such right as he had previously acquired was not consummated or complete. It is the sheriff, moreover, and not Mr. Clark, who is to pay over these moneys to the trustee, because the sheriff alone is in possession of them. The sheriff has no adverse interest against such payment, and he is not, therefore, within the cases cited. *In re* John F. Baudouine, 96 Fed., 536. The proceeds represent the bankrupt's property, and before Mr. Clark's title and right to the possession of the money became consummated, the entire basis of his claim was swept away by the petition in bankruptcy and the provision of section 67*f*. When the restraining order was made, therefore, Clark, under the law applicable, had not even color of title to these proceeds; and he had neither possession, nor right of possession. To such cases the decisions under the act of 1867 have no application.

The decision in the case of *In re* Easley, 95 Fed., 943, was based on the view that section 67*f* applies only to involuntary petitions; whereas that was a case of a voluntary proceeding. This, on the contrary, is an involuntary proceeding, expressly embraced in clause *f* of that section. To my previous rulings on these points I must, therefore, adhere.

2. A further objection is raised that Leon Abbett, one of the original petitioning creditors, was in reality a partner, at least as respects creditors, in Kenney's business; that Abbett is solvent; that the present proceedings in bankruptcy against Kenney alone upon the liabilities of this business is therefore irregular; that the trustee appointed in this proceeding is a trustee of Kenney individually, and not of the firm of Kenney & Abbett, and that such a trustee is not entited to the firm assets, from which the moneys in question were derived (Amsinck *v.* Bean, 22 Wall., 395, 404, 405).

The facts in reference to the relation of Abbett to Kenney
120 were developed upon the trial as to Kenney's insolvency, as above stated, and seem not to have been previously known to creditors. Under an agreement between them dated September 9, 1897, Abbett agreed to permit a debt owing to him by Kenney to remain as an investment in Kenney's business to the amount of $27,828.83, and "at the risk of the business," on the agreement that—

"On the 15th day of August, 1902, said Abbett should be entitled to receive, if Kenney's business prove profitable, in addition to the amount above named a sum equivalent to 10 per cent. of the net profits of the business."

There is no express provision in the contract for the payment of interest, or any other compensation for the use of this money for above five years, except "a sum equivalent to 10 per cent. of the net profits of the said business," as above stated. This is followed by the provision—

"That nothing herein contained shall be deemed, considered or to be construed to constitute a copartnership between the parties herein, anything to the contrary notwithstanding;"

and considering that there is no agreement that Abbett should share in the profits as such, but that the profits were to be merely the measure of his compensation for Kenney's use of the money, or Abbett's forbearance of the debt, I greatly doubt, taking these provisions together, whether the parties to the agreement should be deemed partners even as to creditors. The case seems to be precisely within the decision of Richardson *v.* Hughitt, 76 N. Y., 55, and subsequent cases; Cassidy *v.* Hall, 97 N. Y., 159, 169; Hackett *v.* Stanley, 115 N. Y., 625, 631; First Nat., &c., *v.* Gallaudet, 122 N. Y., 657. It is not necessary, however, to decide that question here. Kenney and Abbett certainly were not partners as respects each other; and even if for the purposes of this case it be assumed
121 that Abbett was a partner as respects creditors, his liability as such was only a personal liability to them only, and their remedies against him will be in no way affected by this proceeding. The agreement gave Abbett no property interest in the business assets of Kenney, and none of the rights of a partner therein, because by the contract between them all such rights are expressly excluded (*In re* Pierson, 10 Fed., 107). The assets remained the sole property of Kenney. The estate is necessarily the individual estate of Kenney only, and all his debts, whether belonging to his business or outside of it, are alike provable against these assets and all his other property as one individual estate. Abbett cannot call him to account as a partner, and he could not have a receiver appointed in any attempt to wind up Kenney's business. The various provisions of section 5 of the bankruptcy act as respects partners show that it has reference to a partnership between the parties, where there may be both joint and individual assets, and not a partnership to creditors only without any possible joint estate (see *In re* Downing, 3 N. B. R., 348; Fed. Cas., No. 4044).

Even if Abbett, therefore, were assumed to be a partner as to creditors, I think the bankruptcy proceeding in this case was properly brought against Kenney only: (*a*) Because Kenney alone is the owner of the property; there is but one estate and that the individual estate of Kenney, and a trustee of Kenney alone could take it; (*b*) because Abbett has no rights as a partner against Kenney or in the assets of his business; (*c*) because the remedy of creditors

against Abbett is a personal remedy only, and (*d*) their remedies are in no way affected by this bankruptcy proceeding.

3. On the part of the sheriff it is further objected that since the former hearing and decision the judgment creditor Clark has filed a bill in equity in the United States circuit court of this circuit against the sheriff and the trustee for the purpose of enjoining
122 the sheriff from paying over the moneys to the trustee and decreeing that they be paid to the complainant, and that the sheriff has been served with a subpœna in equity upon the bill of complaint, against which the sheriff is entitled to protection. The grounds of the suit are the same as those above considered. An affidavit on behalf of the sheriff further states that a suit in the State supreme court has been brought against him and others by said Abbett in reference to said moneys, and that an attachment also against said Kenney in favor of said Abbett, issued out of the supreme court of the State of New York, and executions against said Kenney were in his hands prior to the filing of the petition in bankruptcy for more than sufficient to exhaust the moneys in his hands.

The attachments and executions last referred to are manifestly subsequent to Clark's execution, and have no color of claim against the proceeds of sale. As respects the equity suit by Abbett, it is sufficient to say, that with the papers submitted on this motion is a consent by Abbett that the moneys in question be paid to the trustee.

The bill in equity filed by Clark in the United States circuit court is an obvious attempt to oust this court of its proper jurisdiction, which it had acquired of the subject-matter in controversy prior to the filing of the bill, and which was in due course of adjudication. The complainant had appeared before this court, as he had a right to do in the defense of his asserted rights, submitted an affidavit, and was fully heard by counsel on the previous hearing, as he has been again heard now. If aggrieved, he had, and still has, a further remedy by appeal, or petition of review on all the points raised. If in any case such a bill could be entertained, no facts seem to justify it here. No preliminary injunction has been obtained or sought; though the case is emphatically one for a preliminary injunction if there were any merits in it. I must regard that suit, therefore, as merely obstructive and without merits, which should not be suffered to delay the enforcement of the statutory
123 right of the trustee to the payment of the moneys in question for the benefit of the general creditors. Even should that suit be ultimately successful, the sheriff would not be harmed thereby, since the judgment would protect him in making payment under the order of this court, by directing the decree to be satisfied by the codefendant alone, the trustee, who will have received the money. The appeal from this order, which will doubtless be taken, will, moreover, settle all the questions raised by the bill in equity; so that if this order is affirmed, that suit will in effect be also disposed of; while if no appeal be taken, the matter will be *res judicata* as against the complainant.

An order may be entered directing that the moneys in question be paid to the trustee, to whom all claims of Clark, the judgment

creditor under said levy, shall be deemed transferred and conveyed.

A. B.

November 14th, 1899.

(Endorsed:) U. S. district court, southern district of N. Y. In the matter of Raymond W. Kenney, bankrupt. Second opinion of Brown, J.

124 United States Circuit Court of Appeals for the Second Circuit, October Term, 1900.

Submitted October 31, 1900; decided December 6, 1900.

In the Matter of RAYMOND W. KENNEY, a Bankrupt; EDWARD H. CLARKE, Petitioner. No. 21.

Petition to review order of the district court of the United States for the southern district of New York.

Before Judges Lacombe and Shipman.

This cause comes here upon an appeal from an order of the district court, southern district of New York, which directed that so much of the right under a judgment obtained by Clark against Kenney for $20,906.66 in the supreme court of New York and the levy made by the sheriff under the execution issued to him upon the said judgment as is represented by the proceeds of the sale made by said sheriff under said execution be preserved for the benefit of the estate of the bankrupt, and that the same pass to and shall be preserved by the trustee; and further directing the sheriff to turn over said proceeds, viz: $12,451.09 now in his hands.

LACOMBE, *Circuit Judge:*

The questions arising upon this appeal have been quite fully discussed in the opinion of the district judge, and it seems hardly necessary to write more than an intimation that this court concurs in his reasoning and conclusions.

125 The facts disclosed upon the papers, chronologically stated, are these: On March 6, 1899, Clark recovered judgment against Kenney in the State court for $20,906.66, and execution was issued on the same day. On March 15, 1899, the sheriff sold out defendant's stock of goods which he had levied upon for $12,451.09. On April 13, 1899, petition in involuntary bankruptcy was filed, and Kenney was adjudged a bankrupt on July 12th. The sheriff not having paid over the proceeds of the execution at the time petition was filed, he was temporarily enjoined from doing so, and subsequently after a hearing in which Clark appeared, presented testimony and was heard, the order appealed from was made and entered.

The question presented is, Who is entitled to the $12,451.09—the trustee or the judgment creditor?

As the district judge has clearly pointed out, the answer to this question is to be found not in the earlier act of 1867 nor in the decisions thereon, but in the present act, which is certainly most drastic in its provisions, as will be seen from an inspection of the particular section applicable to the facts in the case at bar:

"SEC. 67*f*. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same and shall pass to the trustees as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title
126 obtained by such levy, judgment, attachment, or other lien of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

There can be no doubt that it was the intention of Congress by this section to prohibit creditors of a bankrupt from obtaining preferences over other creditors as the result of any legal proceedings against him, during the period of four months prior to the filing of the petition. And apt words are used to express that intention. The property of the bankrupt is safeguarded against all such proceedings by the provision that such of them as would ordinarily be liens against such bankrupt, shall be deemed null and void—and the property wholly discharged and released from the same. A broad and liberal construction of the section should be adopted if necessary to effect this intent, but no strained construction is necessary in the face of language so comprehensive. Applying it to the concrete case now before us we find that four months before petition the bankrupt had a stock of goods worth $12,000 or more. He did not sell them and if nothing had happened, they would have been in his possession when the estate passed to the trustee, who might have realized the $12,000 from them to distribute among all the creditors. How has this amount disappeared? Because Clark obtained a judgment against the bankrupt and the sheriff under such judgment made a levy, which removed the goods from the bankrupt's estate, and turned them, through sale, into money. But under the provisions of the bankrupt act the judgment and the levy are to be held null and void. As a consequence the goods have been forcibly removed without right, from the bankrupt's possession by Clark and the sheriff, and are still to be considered a part of his estate,—for the return of which the court, (by explicit provision in

the section) may provide summarily by order,—except that the title of a *bona fide* purchaser for value shall not be interfered with. It makes no difference whether the creditor and sheriff whose only title rests on "null and void" proceedings hold the goods
127 themselves or the money which represents them, nor whether as soon as the sheriff sells under execution, it is his duty to turn over proceeds to the judgment creditor, nor whether under the law of New York the sheriff holds the proceeds as the agent of the creditor, nor that ordinarily such proceeds would be the property of the judgment creditor. They cannot be his property in this case because the only proceedings through which he can make out title to retain their possession are such as the bankruptcy courts must hold to be null and void.

A further objection to the granting of the order based on an alleged partnership between the bankrupt and a person who put some money in the business is sufficiently discussed in the opinion of the district judge.

The order of the district court is affirmed.

S. L. Samuels, for the petitioner.
Nelson S. Spencer, for the trustee.

128 *Notice of Motion.*

United States Circuit Court of Appeals, Second Circuit.

In the Matter of RAYMOND W. KENNEY, Bankrupt; EDWARD H. CLARKE, Petitioner.

Motion for an order directing the controversy in this application to be certified to the Supreme Court of the United States.

Motion noticed for December 17th, 1900.

George Bell, solicitor for petitioner and moving party.
Messrs. Stickney, Spencer & Ordway, solicitors for trustee of Raymond W. Kenney, bankrupt, in opposition to motion.

Endorsed: United States circuit court of appeals, second circuit. Filed Dec. 13, 1900. William Parkin, clerk.

129 *Memorandum Decision.*

Motion to certify to Supreme Court denied.
December 17, 1900.

130 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms in the Post-office building, in the city of New York, on the 17th day of December, one thousand nine hundred.

Present: Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

In the Matter of RAYMOND W. KENNEY, Bankrupt; EDWARD H. CLARKE, Petitioner.

Petition to review orders of the district court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the district court of the United States for the southern district of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the orders of said district court be, and they hereby are, affirmed with costs.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

E. H. L.
N. S.

131 [Endorsed:] United States circuit court of appeals, second circuit. In the matter of Raymond W. Kenney. Order for mandate. United States circuit court of appeals, second circuit. Filed Dec. 17, 1900. William Parkin, clerk.

132 United States Circuit Court of Appeals, Second Circuit.

In the Matter of RAYMOND W. KENNEY, Bankrupt; EDWARD H. CLARKE, Petitioner.

Petition for Rehearing.

To the judges of said court:

Your petitioner Edward H. Clarke represents: This proceeding was a petition to this court to superintend and revise in matter of law orders of the United States district court for the southern district of New York, directing the sheriff of the county of New York to turn over to the trustee in bankruptcy herein a sum of money in his hands made under an execution in favor of the petitioner against the bankrupt. Said orders have been recently affirmed by this court. A copy of its opinion is hereto annexed. This case appeared upon the calendar of this court for hearing about four or five days after the record herein had been printed, and, owing to the shortness of time, petitioner's counsel did not have time to adequately

[Stamped:] United States circuit court of appeals, second circuit. Filed Dec. 28, 1900. William Parkin, clerk.

133 prepare for the argument, especially as he supposed that more time would be granted. The court, however, ordered the argument to proceed, in consequence of which petitioner's counsel was also unable to present a brief for the consideration of the court. The amount in controversy herein is large, exceeding twelve thousand dollars, and the questions involved are novel and important. After the decision of this court, petitioner applied to it for an order

certifying the controversy herein to the supreme court under section 25, paragraph *d* of the bankrupt act, but the court suggested that such certification, if made, must first be determined on by itself of its own volition and motion, and irrespective of any application therefor of a party to the proceeding. The court further suggested that a motion for rehearing be made, and in deference to such suggestion petitioner presents the present petition for a rehearing.

Petitioner further states that in the opinion of his counsel the said United States district court was without jurisdiction of the controversy herein. That the same was a proceeding to determine the rights of adverse parties to the said fund, the said trustee in bankruptcy on the one hand, and petitioner and the said sheriff on the other; that this petitioner having first been brought into this proceeding by the service of an order to show cause restraining the sheriff from paying said money over to him, "appeared specially in said proceeding for the purpose of opposing the motion to continue the restraining order against him, and for no other purpose." This expressly appears by the affidavit of his solicitor George Bell, dated July 5th, 1899, appearing at page 49 of the record. Afterwards when the trustee herein had served his petition for the order directing the sheriff to pay over the money to the trustee, your petitioner filed a plea to the jurisdiction averring that he appeared "solely for the purpose of objecting to the jurisdiction and for no other object." Said plea is found at page 77 of the record. He also filed an affidavit of said George Bell in support of said plea to the juris-
131 diction which is found at page 71 of the record. One of the grounds on which he objected to the jurisdiction was that the said fund belonged to a firm and not to the bankrupt exclusively, and could therefore not be administered by the district court, and in support thereof there was attached to the said affidavit the said partnership agreement which is to be found at page 79 of the record. The statement made in the opinion of this court that petitioner appeared and presented testimony is an error and must have been inadvertently made through misapprehension as to the fact.

The only evidence presented to the court was adduced by the trustee upon said motion. This evidence consisted of the testimony taken upon the hearing of the proceeding to adjudicate the said Raymond W. Kenney a bankrupt, and also of testimony taken upon the first examination of the said bankrupt by his creditors. To these proceedings the petitioner was not a party, nor was he present or represented at said proceedings, and he, therefore, had not enjoyed the right of examining or cross-examining the witnesses at said examinations, and consequently he could not in any way be bound by said testimony. Nevertheless, the said motion of the trustee herein to pay over the said moneys was based upon said testimony, as appears by the trustee's notice of motion appearing at page 63 of the record. For all these reasons, the court had no jurisdiction of the controversy, nor did it proceed in the admission of said testimony in accordance with the rules of evidence.

Another reason why the district court did not have jurisdiction was that the said sheriff was holding the fund in controversy under

and by virtue of a writ of execution which had been issued to him out of the supreme court of the State of New York, and the said United States court had no power or right to interfere with his possession of the said fund, either by summary motion or a plenary suit.

Petitioner further says that, in the opinion of his counsel, this court did not obtain appellate jurisdiction of the said controversy
135 by the aforesaid petitions for review of this petitioner. That said controversy was essentially a suit in equity between the said trustee and the said petitioner and the sheriff, and not a bankruptcy proceeding, and that the only way in which this court could have obtained appellate jurisdiction of said controversy was by an appeal in equity, in accordance with the statute regulating appeals, and not by a petition to review bankruptcy proceedings, and that the said petition for review and all the proceedings consequent thereon in this court were without jurisdiction, and are null and void.

Petitioner represents that his objections to the jurisdiction in the district court were made, not because he had any objection to the consideration of the questions involved by said court, but because, in the opinion of his counsel, said court could not obtain jurisdiction even by consent; but, after the filing of said petitions for review in this court, the supreme court decided, in the case of Bardes *v.* First National Bank, reported in 178 U. S., 524, that the United States district courts could take jurisdiction of such controversies with the consent of the defendant, and thereupon the counsel for petitioner stated to this court upon the said argument that he would waive his right to object to the want of jurisdiction in the district court; that the petitioner had brought a suit in equity against the sheriff and the trustee for the purpose of determining the rights of the respective parties to the fund in controversy in the United States circuit court for the second circuit, which was still pending, and that, as the questions involved would have to be decided by this court either on an appeal from that suit or in this proceeding, it was immaterial to him in which controversy it should be decided.

Petitioner states, however, that his said counsel has great doubts whether the waiver thus made in an appellate court could confer jurisdiction upon the court of original jurisdiction, especially since the appellate court, as before stated, is without jurisdiction of the appeal in which such waiver was made.

136 Petitioner further states that, in the opinion of his counsel, if said consent could be operative, it would only have an effect as of the date when it was made, and that, in order to confer jurisdiction by consent upon the district court of said controversy after the same had terminated by a final order in said court, it would be necessary for the district court to set aside its former order and make a new order based upon said consent to the jurisdiction.

In view of the foregoing petitioner submits that the said orders of the said district court should be reversed for want of jurisdiction and the said court be directed by the mandate of this court to dismiss the said proceeding of the said trustee against the petitioner and the said sheriff, so that the parties may be remitted to said suit

in the circuit court, which is a court of competent jurisdiction. Petitioner states that it is of the utmost importance to all the parties concerned that any judgment or decree determining the rights of the parties to the fund in controversy should be rendered by a court of competent jurisdiction, especially as regards the said sheriff who would not be protected should he pay over the money to the trustee in obedience to the order of the district court, unless that court possessed the proper jurisdiction.

Petitioner further states that in the opinion of his counsel no appeal lies directly from this court to the Supreme Court of the United States for the purpose of reviewing a decree of affirmance or reversal of this court, made upon a petition for review of an order in bankruptcy proceedings made in the district court. That if this court had taken appellate jurisdiction by "appeal" of the controversy herein, an appeal could be taken from its decree as a matter of right to the Supreme Court. That in the said suit pending in the circuit court of the United States, the petitioner, if the decision of the circuit court should be adverse to him, would have a clear right of appeal as of right, both to this court and to the Supreme Court, and petitioner's counsel did not intend by his waiver, made as
137 aforesaid, to deprive petitioner of any right which he would otherwise have to appeal to the Supreme Court.

Petitioner further submits that the questions involved herein are both novel and important, especially the question discussed in the opinion of the court as to the rights of the petitioner to the fund in controversy, and in view of the universality, importance and newness of the bankrupt law, and the importance of the case to the petitioner, he should not be deprived of his right of appeal to the Supreme Court, which he would have in the suit in the circuit court if that suit should be presented to final judgment; that a decision in this court on an appeal from such a judgment would not be final under the act of March 3, 1891, establishing circuits courts of appeals, since it involves a "Federal question."

Petitioner, therefore, prays for a rehearing, and further suggests and prays that, if this court should not direct the said proceeding in the district court to be dismissed for want of jurisdiction, petitioner have leave to file in the court below a bill of review for the reversal of the said decree of the district court for the errors above mentioned, both as to jurisdiction and on the merits apparent upon the face of the record; and, if its decree should be reversed by itself in accordance with the prayer of said bill of review, petitioner will withdraw his former pleas to the jurisdiction above mentioned, and will consent to the said jurisdiction in the said district court, and petitioner will then, in the opinion of his counsel, if the district court should, after a hearing on the merits, according to the regular course of courts of equity, decide against him, have an opportunity to "appeal" as of right, both to this court, and finally, if necessary, to the Supreme Court.

Dated New York, December 21, 1900.

EDWARD H. CLARKE, *Petitioner*,
By GEO. BELL, *Attorney*.

138 STATE OF NEW YORK, } ss:
County of New York, }

George Bell, being duly sworn, deposes and says: I am the solicitor for the above-named petitioner. The statements in the foregoing petition are true.

GEORGE BELL.

Sworn to before me this 21 day of December, 1900.

C. L. WIEBE,
Notary Public, Kings County.

Certificate filed in New York county.

I hereby certify that, in my opinion, the foregoing petition is a meritorious one.

S. LIVINGSTON SAMUELS,
Counsel for Petitioner.

139 —At a stated term of the United States circuit court of appeals for the second circuit, held at the court-rooms, Post-office building, city of New York, on the 14th day of January, 1901.

Present: Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

In the Matter of RAYMOND W. KENNEY, a Bankrupt: EDWARD H. CLARKE, Petitioner.

Counsel for the petitioner herein, Edward H. Clarke, having filed a petition for a reargument, upon consideration whereof it is hereby—

Ordered that said petition be, and it hereby is, denied.

E. H. L.

Endorsed: In the matter of Raymond W. Kenney. Order. United States circuit court of appeals, second circuit. Filed Jan. 15, 1901. William Parkin, clerk.

140 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 139, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Raymond W. Kenney, a bankrupt, Edward H. Clarke, petitioner, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 29th day of January, in the year of our Lord one thousand nine hundred and one, and of

Seal United States Circuit Court of Appeals, Second Circuit.

the Independence of the said United States the one hundred and twenty-fifth.

WM. PARKIN, *Clerk.*

[Ten cent United States internal-revenue stamp.]

141 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Edward H. Clarke is petitioner and Wilbur Larremore, trustee in bankruptcy of Raymond W. Kenney, bankrupt, is respondent, which suit was removed into the said circuit court of appeals by virtue of a petition to review orders of the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,
142 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of March, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

143 [Endorsed:] File No., 18,068. Supreme Court of the United States. No. 583, October term, 1900. Edward H. Clarke *vs.* Wilbur Larremore, trustee, &c. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Mar. 27, 1901. William Parkin, clerk.

144 To the honorable the Supreme Court of the United States, Greeting:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and, under the direction of counsel for the petitioner, said stipulation is certified as a return to the writ of certiorari herein.

Dated New York, April 4th, 1901.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten cent United States internal-revenue stamp.]

145 Supreme Court of the United States, October Term, 1900.

EDWARD H. CLARKE, Petitioner,
against
WILBUR LARREMORE, Trustee in Bankruptcy of Raymond W. Kenney, Bankrupt, Respondent. } No. 583.

Whereas in the above entitled and numbered cause a writ of certiorari has been issued by the Supreme Court of the United States, directing the judges of the U. S. circuit court of appeals for the second circuit to send to the said Supreme Court the record and proceedings in said cause, it is hereby stipulated that the certified transcript of said record now on file in said Supreme Court may be taken as a return to the said writ of certiorari.

Dated New York, March 26th, 1901.

GEORGE BELL, *Attorney for Petitioner.*
STICKNEY, SPENCER & ORDWAY,
Attorneys for Respondent.
NELSON S. SPENCER, *Of Counsel.*

146 [Endorsed:] United States circuit court of appeals, second circuit. In the matter of Raymond W. Kenney. Return to certiorari.

147 [Endorsed:] File No., 18,068. Supreme Court U. S., October term, 1900. Term No., 583. Edward H. Clarke, petitioner, *vs.* Wilbur Larremore, trustee, &c. Writ of certiorari and return. Filed Apr. 15, 1901.

FILED
MAR 2 1901
JAMES H. McKENNEY,
Clerk

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y. 1

Writ Denied. 5/.

In the Supreme Court of the United States.

In the Matter

of

The Petition of EDWARD H. CLARKE for a Writ of Certiorari to the Circuit Court of Appeals of the United States for the Second Circuit.

Notice of Original Motion.

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Sirs:

Take notice that upon the petition of Edward Howard Clarke hereto annexed and upon the record of the controversy herein, on file in the United States Circuit Court of Appeals for the Second Circuit, I will apply to the Supreme Court of the United States at a term thereof to be held at the Court House of said Court in the City of Washington, District of Columbia, on the first Monday of March, 1901, at the opening of said Court on said day, or as soon thereafter as counsel can be heard for a Writ of Certiorari directed to the said United

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States Circuit Court of Appeals or the Judges thereof, directing the said record to be removed to the said Supreme Court for the purpose of having the order of affirmance and proceedings of said Circuit Court of Appeals mentioned in said petition reviewed by the said Supreme Court and for such other relief as may be just and proper.

Dated New York, February 5th, 1901.

Yours, &c.,

GEORGE BELL, Esq.,
Attorney for Edward Howard Clarke,
Office and Post Office Address,
302 Broadway, N. Y.

To

Messrs. Stickney, Spencer & Ordway,
Attorneys for Wilbur Larremore, Trustee in Bankruptcy of Raymond W. Kenney, Bankrupt,
31 Nassau Street,
New York City, N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

In the Matter of The Petition of EDWARD H. CLARKE for a Writ of Certiorari to the Circuit Court of Appeals of the United States for the Second Circuit.	Original Petition.

To the Judges of the Supreme Court of the United States:

Your petitioner, Edward H. Clarke, respectfully represents:

FIRST.

That on the 23rd day of January, 1899, he commenced an action in the Supreme Court of the State of New York against one Raymond W. Kenney, upon certain promissory notes theretofore made by said Kenney for a valuable consideration to one Helen L. Kenney, and endorsed by the said payee to your petitioner, and thereafter on March 6th, 1899, petitioner recovered judgment against the said Kenney in said action for the sum of $20,906.66, and on the said day caused an execution thereunder to be levied by the Sheriff of the County of New York,

10 upon a stock of goods and fixtures situated at No. 24 West 23rd Street in the City of New York, and said goods were on March 15th, 1899, sold by the said Sheriff at public auction, and said officer realized therefrom the sum of $12,451.09.

SECOND.

That on the 13th day of April, 1899, James M. McCreery & Co., and others, creditors of the said Raymond W. Kenney, filed a petition in involuntary bankruptcy against him in the United States District Court for the Southern District of New
11 York, alleging the commission of an act of bankruptcy against him, and they obtained at the same time from the Judge of said Court an order directed to said Sheriff and your petitioner ordering them to show cause before said Court why the Sheriff should not be enjoined until the appointment of a trustee in said bankruptcy proceedings, from paying over any portion of the said $12,451.09, which were still in his hands to your petitioner which order to show cause was served upon your petitioner's attorney and upon the said Sheriff.

THIRD.

12 That thereafter on the 20th day of July, 1899, the said Court adjudicated the said Raymond W. Kenney, a bankrupt, and made an order permanently enjoining the Sheriff from paying over the said sum to your petitioner and commanding him to pay said money to a trustee in bankruptcy of the said

Kenney upon the appointment and qualification of said trustee. 13

FOURTH.

That thereafter on the 26th day of September, 1899, Wilbur Larremore, Esq., was duly appointed trustee of the estate of the said Kenney, bankrupt, and has accepted said appointment and qualified, and is now the acting trustee of said Kenney.

FIFTH.

That on the 20th day of October, 1899, the said trustee served upon your petitioner and the said 14
Sheriff and the said bankrupt notice of a motion in the said District Court of the United States for the Southern District of New York, for an order under Section 67 paragraph f. of the Bankrupt Law of 1898, that so much of the right under the judgment obtained by your petitioner against Kenney and the levy thereunder made by the said Sheriff under the said execution aforesaid as might be proper, should be preserved for the benefit of the estate of said Kenney, bankrupt, and that the same should pass to and be preserved by the trustee for the benefit of said estate, and that the Sheriff should pay over forth with said sum of money in his hands to the said 15
trustee.

SIXTH.

That on the 25th day of November, 1899, an order was made by the Hon. Addison Brown, Judge of the United States District Court, granting the said motion of the trustee in all respects.

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SEVENTH.

That thereafter petitioner filed a petition in the United States Circuit Court of Appeals for the Second Circuit to superintend and revise in matter of law in accordance with the provisions of Section 24, paragraph b, of the Bankrupt Law of 1898, the above mentioned order of Judge Brown to show cause made April 13th, 1899, and his said injunction order made July 20th, 1899, and his said final order made November 25th, 1899, and the said Court of Appeals after hearing of said petition for review affirmed the above mentioned orders, and on
17 the 17th day of December, 1900, issued its mandate to the said United States District Court directing it to carry its said orders into execution.

EIGHTH.

That thereafter your petitioner in accordance with Section 25, paragraph d, of the Bankrupt Law of 1898, applied to the said United States Circuit Court of Appeals for a writ or certificate certifying the controversy between your petitioner and the said trustee and the said Sheriff to this Court, but the said Circuit Court of Appeals refused said
18 application.

NINTH.

That thereafter your petitioner applied to the said United States Circuit Court of Appeals for a rehearing, and also for leave to file a bill of re-

view in the said United States District Court, but the same was in all things denied.

TENTH.

That in the application mentioned in the preceding paragraph, your petitioner urged that both the said District Court and the said Circuit Court of Appeals were without jurisdiction in that petitioner had never consented to the jurisdiction of the said District Court, but on the contrary had objected to the same.

ELEVENTH.

That your petitioner, as he is advised by his counsel and believes, cannot bring the record of said controversy by appeal or writ of error as a matter of right to this Court under any Act of Congress conferring appellate jurisdiction upon this Court, but that his only remedy to have said order of the United States Circuit Court of Appeals reviewed by this Court is by application for a writ of certiorari under Section 25, paragraph d, of the Bankrupt Law of 1898.

TWELFTH.

That upon the hearing of the said controversy before the United States District Court and upon the hearing of the said petition for review before the said United States Circuit Court of Appeals your petitioner contended by his counsel that the

said sum of money in the Sheriff's hands was no part of the estate of the said bankrupt on two grounds: first, that the goods levied on by the Sheriff having been sold and reduced to money by him more than a month before the filing of the petition in bankruptcy, the same became the absolute property of your petitioner as the judgment and execution creditor of the said Kenny, freed from the lien of said execution, and did not pass to the trustee under Section 67, paragraph f, of the Bankrupt Law; and second, that said goods were not the property of the said Kenney, but were the property of a partnership firm composed of the said Kenney and of one Leon Abbett, and, therefore, did not pass to the trustee of said Kenney.

THIRTEENTH.

That petitioner has filed herewith a copy of the original record which was filed with and considered by the said United States Circuit Court of Appeals, and of all the proceedings in said Court.

Wherefore, your petitioner prays that a writ of certiorari may issue out of this Court to the said United States Circuit Court of Appeals in such form as may be proper to review its said order affirming the order of the District Court as aforesaid, and for such relief in the premises as the nature of the case may require, and that to that end such rule to show cause or alternative writ may

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issue as may be proper. And your petitioner will ever pray, &c.

EDWARD H. CLARKE,
By George Bell, his attorney,
302 Broadway,
New York City.

S. Livingston Samuels,
Of Counsel,
346 Broadway,
New York City.

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FILED
MAR 2 1901
JAMES H. McKENNEY,
Clerk

No. 1583 Misc. 51

Brief of Bell & Samuels for Petr

Filed March 2, 1901.

In the Supreme Court of the United States.

In the Matter of the Petition of EDWARD HOWARD CLARKE for a writ of certiorari to the Circuit Court of Appeals of the United States, in the Second Circuit, to review an order affirming an order of the District Court, sitting as a court of bankruptcy in the matter

of

RAYMOND W. KENNEY,
Bankrupt.

WILBUR H. LARREMORE, Trustee in Bankruptcy,
Respondent.

Original Motion.

Motion and Argument.

This is a motion for a writ of *certiorari* to review the affirmance by the Circuit Court of Appeals in the Second Circuit of an order made by the District Court in bankruptcy, directing the Sheriff of the County of New York to pay over to the trustee of Raymond W. Kenney, bankrupt, the sum of $12,451.09. On March 6th, 1899, the petitioner Clarke recovered judgment against Raymond W. Kenney in the Supreme Court of the State of New York, for $20,906.66, and execution was issued on the

same day. On March 15th, 1899, the Sheriff sold Kenney's stock of goods which he had levied upon for $12,451.09. On April 13th, 1899, a petition in involuntary bankruptcy was filed against Kenney and he was adjudicated a bankrupt, on July 12th, 1899. Mr. Larremore was afterwards appointed his trustee. The sheriff not having paid over the proceeds of the execution at the time the petition was filed, he was temporarily enjoined by the United States District Court Judge from doing so, and subsequently the same Judge made the order directing the sheriff to pay over the money in his hands to the trustee. The execution creditor Clarke filed a petition for a review of the said order with the United States Circuit Court of Appeals, and that Court after hearing, affirmed the same, to review which affirmance a writ of *certiorari* is herein applied for.

POINTS.

I.

The Supreme Court has jurisdiction to issue a writ of certiorari to remove the record of the controversy in bankruptcy herein to itself from the Circuit Court of Appeals for the purpose of reviewing the decree of the latter Court.

The present petition is presented under Section 25, Subdivision d, of the Bankrupt Act.

This provision was undoubtedly enacted to prevent a defect of jurisdiction which existed under the Act of 1867, viz.; that no appeal could be taken to this Court from a decree of the inferior Courts

exercising supervisory jurisdiction over the decrees of Courts of bankruptcy in bankruptcy proceedings, (Morgan v. Thornhill, 11 Wall. 65; Cleveland Ins. Co., v. Globe Ins. Co., 98 U. S., 366). Its intention is to confer upon this Court the same jurisdiction in bankruptcy proceedings as is created by the Act of March 3, 1891, Section 6, in other cases where a judgment of the United States Circuit Court of Appeals is final.

It provides first that *controversies* may be certified to this Court from other Courts of the United States, which would include the Circuit Courts of Appeal. A proceeding in bankruptcy is a suit, (Sandusky v. National Bank, 23 Wall. 289, 292-293) and a "controversy" is involved in a suit whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation and is presented by pleadings for judicial determination.

> Gaines v. Fuentes, 92 U. S , 10, 20.
> Searl v. School District No. 2, 124 U. S., 197, 199.

The further provision in Subdivision d, Section 25, that this Court may exercise jurisdiction of such controversies and issue writs of *certiorari* pursuant to the provisions of the United States law now in force, was intended to confer the same power to take appellate jurisdiction through the medium of writs of *certiorari* as is granted by Section 6 of the Act of March 3, 1891, establishing Circuit Courts of Appeal. It did not mean to confer such grant of jurisdiction only in a case where the inferior Court would certify the controversy, because in that event the power to take jurisdiction would be implied and need not be expressed, and the necessity of issuing a writ of *certiorari* would not arise. This subdivision of Section 25, means

that application for a certification of the controversy must first be made to the inferior Court, and if that application be denied, this Court may, on application duly made to it, take jurisdiction of the controversy and remove the record thereof to itself by *certiorari*. In the case at bar an application for a certification of the controversy has been made to the U. S. Circuit Court of Appeals, and has been denied.

II.

The Sheriff having sold the goods levied on, and reduced the same to money before the filing of the petition in bankruptcy, such money was the property of the plaintiff in execution and not that of the bankrupt at the time of the adjudication, and the trustee therefore has no title to the same.

The relief sought by the trustee herein was claimed under Sec. 67 Clause f, of the Bankrupt Act. That paragraph in specifying the property which shall pass to the trustee evidently contemplates that at the time of the adjudication of bankruptcy there must be in existence property of the bankrupt on which rests one of the liens mentioned, in order that the adjudication should act upon it. A sum of money in the sheriff's hands made under an execution is not property subject to a lien as described in that paragraph, but the sheriff owes it to the execution creditor, and the debt thus existing is the property of the latter.

The paragraph mentioned, in specifying the various judicial liens, does not mention executions.

It speaks only of "levies" evidently intending the levy as the ultimate stage of the execution in which the adjudication of bankruptcy should have power to operate upon the lien. It is clearly the intention of Congress that when the enforcement of an execution has proceeded so far as to have passed beyond the stage of the levy, it should no longer be interfered with by an adjudication in bankruptcy, otherwise, the act would not have spoken of levies, but of executions generally.

The question then involved in this case is, since Sec. 67, Clause f, provides that the liens mentioned shall be deemed null and void in case the alleged bankrupt is adjudicated as such and the "*property affected by such lien*" shall be deemed wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, can money made by a sheriff by levy and sale under an execution before the filing of the petition be regarded as "*property of the judgment debtor affected by a levy*"?

While the personal property continues to rest under the levy, the judgment debtor remains the owner thereof, and he can convey title subject to the lien of the execution.

Mumper v. Rushmore, 79 N., Y. 19.

After sale, the money realized belongs in effect to the judgment creditor.

It is doubtless the law that the specific coins or bills which have been realized by the sheriff on an execution sale are not the chattels of the execution creditor, and for that reason cannot be levied upon specifically as his property. The sheriff, however, by virtue of his proceedings becomes the debtor to the plaintiff in execution to the extent of the money realized by him.

Turner v. Fendall, 1 Cranch, 117.

The specific money collected by the sheriff belongs to him, and if it is lost before payment to the judgment creditor, the loss falls on the officer; as for example, if he deposits it in a bank which fails.

Phillips v. Lamar, 27 Ga., 228;
Shaw v. Bauman, 34 Ohio St., 32.

Or if it be stolen from him:

Gilmore v. Moore, 30 Ga., 628;
United States v. Dashiell, 4 Wall., 182 (case of U. S. Paymaster).

The New York Code of Civil Procedure provides that an execution against property "must substantially require the Sheriff *to satisfy the judgment*" out of the property of the judgment debtor. C. C. P., Sec. 1369. The mere levy is not a satisfaction. The satisfaction is complete when the title to the goods levied on is changed by the act of the sheriff.

United States v. Dashiell, 3 Wall. 688.

That it is the receipt of the money by the Sheriff and not by the creditor which extinguishes the judgment, is shown by N. Y. Code of Civ. Pro., Sec. 1266, which provides that "a sheriff upon being paid the full amount due upon an execution in his hands must immediately endorse thereupon a return of satisfaction thereof."

It is well settled that a sheriff collecting money on execution, becomes a debtor to the execution creditor for the amount collected, and the latter has a cause of action against him for money had and received without demand.

Brewster v. Van Ness, 18 Johns., 133.
Dygert v. Crane, 1 Wend., 534.

People v. Dunning, 1 Wend. 16.
Walden v. Davidson, 15 Wend., 575.

In such an action not only the debt, but interest may be recovered.

Slingerland v. Swart, 13 Johns., 225.
Crane v. Dygert, 4 Wend., 675.

The Sheriff is in the same position as a bank with whom a depositor has deposited money. The latter loses his title to the specific deposits and they could not be levied on under an execution against him even if the bank were to pick them out and set them aside for the purpose of such levy. Carrol v. Cone, 40 Barb., 220. But he has an action against the bank for the amount of his deposit, and his *claim* could be attached as a *chose in action*. In like manner, money collected by a Sheriff on execution could be attached as against the execution creditor as the latter's *chose in action*.

Wehle v. Connor, 83 N. Y., 231.

In Nelson v. Kerr (59 N. Y., 224), the Court say: "The Sheriff in collecting an execution, acts "as the officer of the Court whose process it is, and "also as the *agent* appointed by law of the party "who seeks by aid of the writ to obtain satisfaction "of the debt or thing awarded by the judgment. "*The money collected by the Sheriff belongs to the* "*plaintiff. The Sheriff when he receives it acts as* "*the agent of the party who has the judgment,* "*and it is money had and received by him to the* "*plaintiff's use.*"

So clearly is the money collected by the Sheriff on execution the property of the execution creditor, that if the Sheriff has by mistake paid the money over to a third party, the execution

creditor himself, and not the Sheriff, can sue the latter for the money as his own.

Kingston Bank v. Eltinge, 40 N. Y., 391.
Haebler v. Myers, 132 N. Y., 363, 369.

In the Kingston Bank case the Court say at page 395: "The money thus received by the defendant was the plaintiff's money. That it did not belong to the defendant, follows necessarily." The plaintiff here referred to was the execution creditor.

This property right in an execution creditor arises only after a sale has been made and the money collected by the Sheriff. Before that time he has no right of property whatever in the goods levied upon. In the case of an injury to those goods by a wrong doer, or of loss of their possession by the Sheriff, the latter or the judgment debtor can sue, and not the creditor. The latter can sue in a certain case provided for by Statute, *but not at common law.*

Scott v. Morgan, 94 N. Y., 508.

It follows from the identification of the execution creditor with the Sheriff as principal and agent by operation of law, that if the property levied on is injured, lost or destroyed by the act of the officer, the loss as between the creditor and the debtor falls on the former and not on the latter. The execution is in that event deemed satisfied to the extent of the property levied on, and the claim of the creditor to recover his debt thereafter exists against the Sheriff and not against the execution debtor.

Peck v. Tiffany, 2 N. Y., 451.
United States v. Dashiell 3 Wall., 688.
Matter of Dawson, 110 N. Y., 114.

In the matter of Dawson (*supra*), it was held, that where a sheriff misappropriates money

collected by him under a writ of attachment, that the plaintiff in the suit, and not the defendant, must bear the loss. The Court say at page 117:

"The question now to be determined is, who is to "bear the loss of the Sheriff's misconduct and de- "fault, plaintiffs or defendant? We think the "loss should fall upon the plaintiffs. If this "money had been seized by virtue of an execution, "and the defendant had been deprived thereof, it "is well settled that the loss would fall upon the "plaintiffs, and that to the extent of the property "thus taken the judgment and execution would be "satisfied." And again at page 118: "*If this "money had been seized by virtue of an execution, "it would at once have operated as a payment pro "tanto upon the execution.* Here in theory of "law, the money is in the possession of the Sheriff, "and when execution was issued to him it was at "once applicable thereon, and must be deemed to "have been so applied. If the Sheriff had been "found within his county, and the execution "had been actually delivered to him, he could "not have returned the same unsatisfied, but could "have been compelled to return the same satisfied "as to the amount of money received by him upon "the attachment. (Code Sec. 708). And such a "return would have been conclusive in favor of "the defendant, and would have left the plaintiffs "with their remedy against the sheriff for money "received by him."

In other words, the Sheriff being the agent of the execution creditor, a payment to the former is in law a payment to the latter. It is just the same as though the money had been paid to the plaintiffs' attorney in the action, or other agent. The consequence is, that when this money has been received by the Sheriff, it is no longer the property

of the judgment debtor. There is no lien upon it for anybody. It is, in effect, the property of the creditor, whose only claim after its receipt by the Sheriff is against the latter as his collecting agent. Such being the status of the fund, Section 67 of the Bankrupt Law does not apply to it. It is no more to be regarded as the property of the judgment debtor affected by a lien than if it were in the hands of the execution plaintiffs' attorney.

The learned Judge who delivered the opinion of the United States Circuit Court of Appeals herein, holds that these principles which were urged by us, do not apply, because the money received by the sheriff takes the place of the goods levied on, and must be regarded as property of the debtor covered by the lien. This would be correct if the goods had been sold under an *attachment*, as perishable property for example, and the money held by the Sheriff to await the subsequent judgment in the action. An execution rests on different principles by reason of the fact that the plaintiffs' claim against the defendant has been previously settled by judgment, and the money collected by the sheriff, satisfies the judgment at the very instant of its receipt by him.

Another point made in the said opinion is, that the execution creditor's rights are of no effect because they rest on proceedings which, having been taken within four months prior to the filing of the petition in bankruptcy, are to be deemed null and void. This overlooks the fact that the execution had fulfilled its office and become *functus officio*, and in fact the sixty days time allowed for its return had expired, before the adjudication in bankruptcy, which event under Section 67 of the Bankrupt Law was to effect its dissolution. The execution was issued March 6th, 1899, and had sixty days to run (fol. 134); and the judgment

debtor was adjudicated a bankrupt July 12th, 1899 (fol. 119). There was therefore no lien in existence at the time of the adjudication to be operated upon, and we have found no case which holds that the adjudication should operate retrospectively to dissolve a lien which had been created within four months, but had also fulfilled its object and terminated in its existence within that time. That the contrary is the true rule is shown in Conner v. Long, 104 U. S., 228, where the question is fully discussed.

Under the Bankrupt Act of 1867, the assignment in bankruptcy related back to the commencement of the proceedings and dissolved any attachment on the bankrupt's property made within four months next preceding such commencement.

In Conner v. Long (*supra*), the Court at pages 231-232 shows that it is an attachment then existing which is dissolved by the filing of the petition in bankruptcy, and not one which has been previously merged into a sale. Thus, it says, that if the goods levied on have been previously sold, the assignee cannot follow them, "for the latter, not being subject to the attachment at the commencement of the bankruptcy proceedings, the title thereto is not transferred to the assignee." The Court, however, says, that if the proceeds of the sale remain in the hands of the Sheriff *after the filing of the petition*, the assignee may recover them from the officer. The reason is that the lien of the attachment is transferred from the goods to the money derived from their sale, and that lien being in existence when the petition is filed, is dissolved by that event and the right to the money passes to the assignee. We have above shown that that rule would not apply to an execution. The Court further holds that if *after* the filing of the petition, the money is paid to the plaintiff in

the attachment suit by the Sheriff, the assignee may recover it from the former. It does not say that if the money had been paid over *before* the filing of the petition the same result would follow. The same judge who decided the case at bar held in another suit that if money made under circumstances like the present had been paid over by the Sheriff to the execution creditor before the filing of the petition in bankruptcy, it could not be recovered by the trustee.

In re Blair, 102 Fed. Rep., 987.
See *in re* Easley, 93 Fed. Rep., 419.

The Court in Conner v. Long further holds that if the property had been sold after the filing of the petition, the attachment lien thereon was at once dissolved by such filing and the assignee can follow the property into the hands even of an innocent purchaser or hold the Sheriff for a conversion. It was to avoid such injustice that Section 67, Clause f, of the present Act contains the saving in favor of innocent purchasers.

The fact that that section and subdivision provides that the Court may order the right under the levy or other lien to be preserved for the benefit of the estate and order such conveyance as may be necessary, shows that it refers to an existing lien. Under one already extinguished by its prior enforcement there would be no "right" in existence to be preserved, and such a lien could not possibly be "conveyed".

If the view taken in the opinion of the Circuit Court of Appeals herein is a correct one, that the proceedings to enforce the execution are null and void, notwithstandnig their completion before the filing of the petition in bankruptcy, it will necessarily follow that the Sheriff is a trespasser and must

account for the proceeds of the execution to the trustee in bankruptcy, notwithstanding that he may have paid them over in good faith to the execution creditor before any petition in bankruptcy was filed.

The provision in Section 67, Clause f, that it shall not affect the title obtained under the lien by an innocent purchaser for value, does not militate against our view, because that provision was intended to apply to the case of a purchaser who bought after the filing of a petition in bankruptcy without notice thereof. As to a purchaser who had bought before such filing, although within the four months, no such provision was necessary, because his title being good when acquired, could not be affected by bankruptcy proceedings which occurred subsequently.

It is respectfully submitted that the writ of certiorari should issue as prayed.

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No. 261 Sp

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Feb. 24. 1902.

No. 262.

EDWARD H. CLARKE,

Petitioner,

vs.

WILBUR LARREMORE, Trustee in Bankruptcy of RAYMOND W. KENNEY,

Bankrupt.

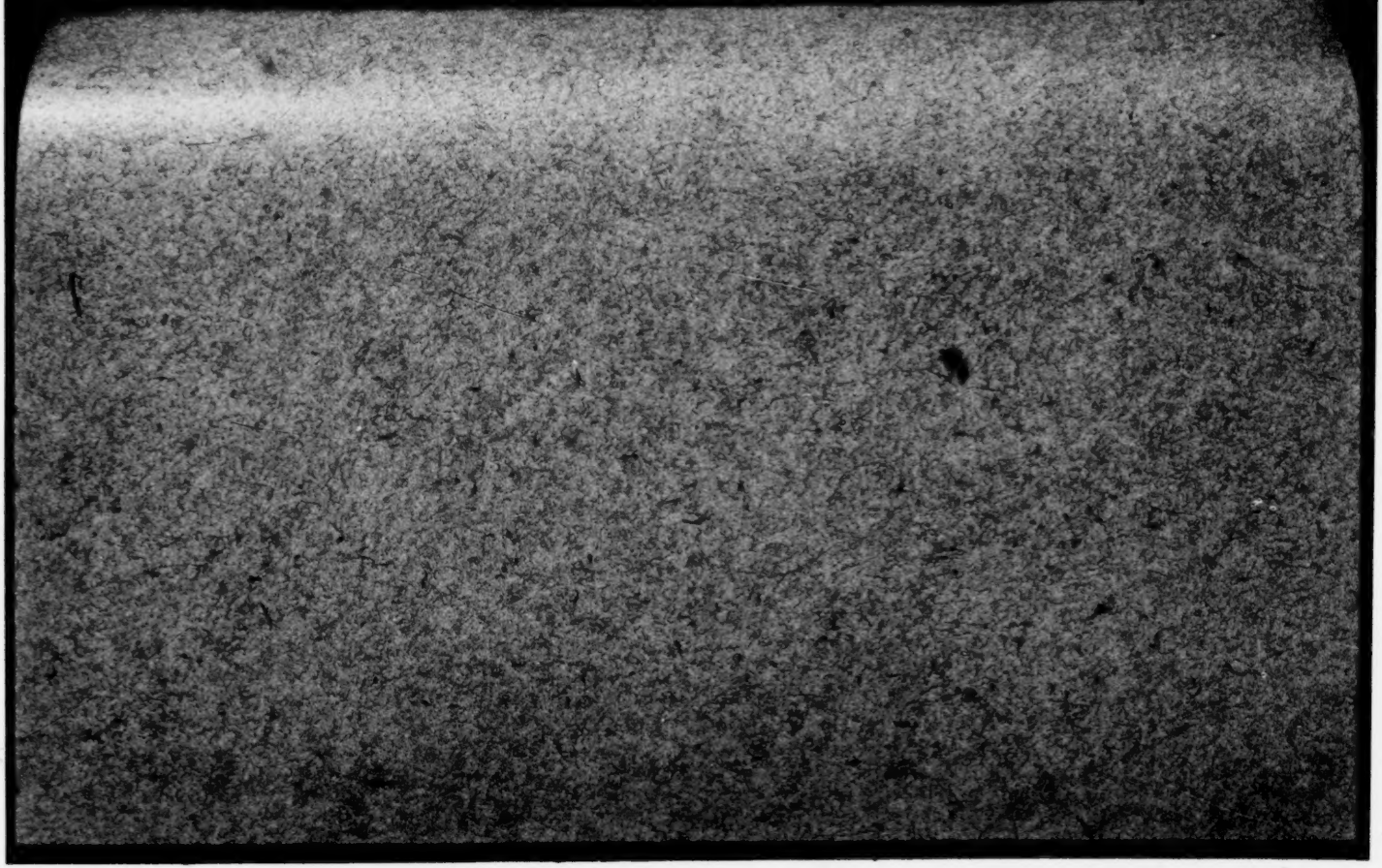
BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

S. Lawrence Samuels,

Counsel for Edward H. Clarke,

Petitioner.



In the Supreme Court of the United States,

OCTOBER TERM, 1901.

EDWARD H. CLARKE, Petitioner, against WILBUR LARREMORE, Trustee in Bankruptcy, of RAYMOND W. KENNEY, Bankrupt.	No. 262.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER.

Statement of Case.

This record comes here on certiorari to the U. S. Circuit Court of Appeals for the Second Circuit, to review an order affirming two orders of the U. S. District Court for the Southern District of New York, dated respectively July 20th, 1899, and November 25th, 1899, which directed the Sheriff of the County of New York to pay over to Wilbur Larremore, the trustee in bankruptcy herein of

Raymond W. Kenney, Bankrupt, the sum of $12,451.09 in his hands, made by him under an execution against the bankrupt.

On January 23d, 1899, petitioner was the owner of certain notes made by the bankrupt, Kenney, to Helen L. Kenney, and endorsed and transferred by the latter to the petitioner, and on said day he commenced an action thereon in the Supreme Court of the State of New York against Kenney, and thereafter, on March 6th, 1899, he recovered judgment for the sum of $20,906.66, and caused an execution to be delivered to the Sheriff of the County of New York (Rec. p. 7).

The execution was levied upon a stock of goods and fixtures belonging to Kenney and used in his business as a fur merchant, in the City of New York, and they were sold by the Sheriff on March 15th, 1899, and realized the sum of $12,451.09, which is the money in controversy herein (Rec., p. 7).

Shortly after the levy of the execution by the Sheriff, one Leon Abbett, procured a warrant or writ of attachment against the property of the said Kenney, from the Supreme Court of the State of New York, and caused the same to be levied upon the stock and fixtures above mentioned. Immediately thereafter he commenced a suit for a permanent injunction in the Supreme Court, in aid of his attachment, against Clarke, to restrain the enforcement of the latter's judgment, claiming that his debt was a fraudulent one, and in that action he obtained *ex parte*, a temporary injunction restraining the Sheriff from paying over the said sum of money to Clarke. Upon the hearing of a motion to dissolve this injunction, the Supreme Court decided that the debt was valid and honest, and made an order dissolving the injunction (Rec. 28). Upon the same day, April 13, 1899, that this

order was entered, and before the Sheriff could pay over the money to the execution creditor, a petition in bankruptcy was filed against Kenney in the U. S. District Court for the Southern District of New York, at the instigation of said Abbett (Rec. 29), and the Hon. Addison Brown, Judge of said Court, issued an order restraining the Sheriff from paying over the said money in his hands to the execution creditor, Clarke (Rec. 10, 13).

Before the election of the present trustee, Judge Brown made the order of July 20th, 1899, above mentioned, directing the Sheriff to pay over the money in his hands to the Trustee when the latter should be elected and have qualified (Rec. 34), and handed down an opinion which is reported at page 65 of the record, and in 95 Fed. Rep., 427.

Thereafter the creditors elected the present trustee (Rec. 57), who thereupon made a motion for an order directing the Sheriff to pay over to him the money in his hands (Rec. 37). After a hearing of all the parties interested, Judge Brown granted the order prayed for, which is dated November 25th, 1899 (Rec. 62), and delivered an opinion which is contained at page 66 of the record, and in 97 Fed. Rep., 554. The execution creditor, Clarke, thereupon filed a petition with the U. S. Circuit Court of Appeals for the Second Circuit, for a review of the two orders above mentioned, and said Court, after a hearing of the petition, made an order affirming the said orders of Judge Brown (Rec. 75), and handed down an opinion which will be found at page 72 of the record, and in 105 Fed. Rep., 897.

Thereafter, upon application of the execution creditor, a writ of certiorari was granted by this Court, to review the said order of the Circuit Court of Appeals (Rec. 80).

It was claimed by the petitioner, Clarke, both before the District Court and the U. S. Circuit Court of Appeals, that although his execution was levied within four months prior to the filing of the petition in bankruptcy against Kenney, yet, that since he had reduced the goods levied on to money before that time, the same was no longer the property of the bankrupt, and did not pass to the trustee under the provisions of Section 67, "*f*" of the Bankrupt Act, but belonged to him, as execution creditor.

This point was overruled by the District Court and the Circuit Court of Appeals.

Assignment of Error.

For error, the petitioner says that the Court erred in rendering judgment against him on the ground that the money in controversy herein is not subject to the provisions of the Bankrupt Law.

ARGUMENT.

POINTS.

I.

The sheriff having sold the goods levied on before the filing of the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt, at the time of the adjudication, and the trustee, therefore, has no title to the same.

(*a*) *The object of the law is to annul liens only, existing at the date of adjudication.*

The application of the trustee for the payment to him of the money in the Sheriff's hands was made under the provisions of Sec. 67, subdivision *f*, of the Bankrupt Act, and he prayed therein that the right under the judgment, execution and levy of Clarke, should be preserved for the benefit of the estate of the bankrupt, and should pass to him as trustee, and that the Sheriff should pay over the proceeds of the execution sale in his hands (Rec. 36).

Section 67, Subdivision "f," of the Act is as follows:

"That all levies, judgments, attachments or other "liens, obtained through legal proceedings against "a person who is insolvent, at any time within four "months prior to the filing of a petition in bank-"ruptcy against him, shall be deemed null and void "in case he is adjudged a bankrupt, and the prop-"erty affected by the levy, judgment, attachment, "or other lien, shall be deemed wholly discharged "and released from the same, and shall pass to "the trustee as a part of the estate of the bank-rupt, unless the Court shall, on due notice, order "that the right under such levy, judgment, attach-"ment, or other lien shall be preserved for the ben-"efit of the estate; and thereupon the same may "pass to and shall be preserved by the trustee for "the benefit of the estate as aforesaid. And the "Court may order such conveyance as shall be nec-"essary to carry the purposes of this section into "effect. *Provided*, that nothing herein contained "shall have the effect to destroy or impair the title "obtained by such levy, judgment, attachment, or "other lien, of a *bonâ fide* purchaser for value who "shall have acquired the same without notice or "reasonable cause for inquiry."

This paragraph refers to the day of the adjudication of bankruptcy, and makes such *adjudica-*

tion, and not the *filing of the petition*, the act which effects the dissolution or nullification of the judicial liens mentioned. A similar provision is made by Sec. 67, subdivision *c*, which involves the same subject matter.

The main idea expressed by subdivision *f* is, that if there be in existence, at the time of the adjudication in bankruptcy, property to which the debtor *then* has title on which there rests at the time one of the judicial liens mentioned, such lien shall be dissolved or rendered null and void by the decree of adjudication, and the property shall therefore pass to the trustee, freed from the operation of that lien, unless the Bankruptcy Court shall, in its discretion, order the lien to be preserved for the benefit of the estate, in which event the *lien* will pass to the trustee, and he can enforce it for the benefit of the estate. That idea is also expressed by subdivision *e*. The Bankruptcy Court must investigate the history of the then existing lien to see whether it has been created within four months prior to the time of the filing of the petition in bankruptcy. If it has existed for more than that length of time it is not affected by the adjudication. If it has been created within the four months, then the adjudication nullifies it, unless the Court shall, in its discretion, order it to be preserved. A lien which has already been foreclosed and become *functus officio* is not to be regarded, although created within that time. Where, before the adjudication, the property levied upon has been sold and converted into money, which is in the hands of the Sheriff, the state of affairs contemplated by subdivision *f* no longer exists. There is no property affected by the "levy" or other lien. The property which *was* affected has passed to the purchaser; the lien has become extinguished; the money in the hands of the Sheriff, although the

particular coins or bills are legally the latter's money, is practically the property of the creditor, and therefore cannot be affected by the adjudication, because subdivision *f* contemplates property of the *debtor*.

Section 67 throughout all its subdivisions deals with the subject of liens only, and subdivisions *e* and *f*, are devoted to the consideration of judicial liens. Such liens are of three kinds: Those which are originated by the commencement of a suit, as an equitable lien created by the filing of a creditor's bill; those which arise during its progress as an attachment; and those which are created after its termination, as a judgment lien on real estate or an execution lien. These three classes of liens are doubtless comprised in the language of subdivision *e*, namely, "a lien created *by*, or obtained *in*, or *pursuant to*, any suit or proceeding at law or in equity." The same idea is expressed in the enumeration in subdivision *f* of "levies, judgments, attachments or other liens, obtained through legal proceedings." It mentions such liens in the inverse order in which they may be created. It speaks first of "levies," meaning the lien created by the levy of an execution or other final process; next, of "judgments," which naturally must precede such levy; next, "attachments," which must naturally precede judgments; and lastly, "other liens," which doubtless refers to liens created by the commencement of a suit in equity.

Subdivision *f* does not mention executions, although these are the most important and numerous of all writs, and the ones which would most readily occur to the mind of the Legislature in this connection. The enforcement of a writ of execution embraces five steps: (1) the issuance of the writ and its delivery to the Sheriff; (2) the levy by the officer; (3) the conversion of the prop-

erty levied on into money by a sale; (4) the payment to the plaintiff; and (5) the return. By failing to mention "executions" and specifically mentioning "levies" Congress evidently intended to constitute that stage of the progress of the execution, as the specific and ultimate point at which the adjudication of bankruptcy should arrest the enforcement of the execution. It is the levy which perfects the lien of the execution, and retains such lien until a sale for the purpose of allowing the title of the purchaser to relate back to it.

In Bond v. Willet, 1 Keyes, 377, 386, the New York Court of Appeals say: "A levy upon per-"sonal property is the act of taking possession of, "attaching or seizing it, by the sheriff or other "officer, under and by virtue of any execution he "may hold against such property, whereby the lien "of such execution upon such property becomes "perfect, and the property is thereupon deemed to "be in the custody of the law." After sale, it is released from the custody of the law. The intention of Congress therefore evidently must have been that after the stage of the levy had been passed, and a sale had occurred, the subsequent adjudication of bankruptcy should not affect the further operation of the execution.

Congress, therefore, in this enumeration, having had in view a *levy* as the ultimate lien which should be affected by an adjudication, if before that time, the levy has performed its office and ceased to exist, the Court by construing the lien to extend to the stages of sale and receipt of the money by the sheriff would be encroaching upon the domain of the Legislature.

The question then for solution in this case is simply this: Can the money made by the Sheriff by a sale under the execution before the filing of

the petition, be regarded as property of the judgment debtor "affected by the levy" within the language of subdivision *f*?

We assert the negative to that question.

(b.) The sheriff after an execution sale becomes a debtor to the creditor.

While the personal property continues to rest under the levy, the judgment debtor remains the owner thereof, and he can convey title subject to the lien of the execution. Mumper v. Rushmore, 79 N. Y., 49; Ansonia B. & C. Co. v. Connor, 103 N. Y., 502, 511-512. After the sale of the property the money realized belongs in effect to the judgment creditor, as we shall endeavor to show.

It is doubtless the law, as stated by the District Judge (Rec., p. 68), that the specific coins or bills which have been realized by the Sheriff on an execution sale, are not the chattels of the execution creditor, and for that reason cannot be levied upon specifically as his property. The Sheriff, however, by virtue of his proceedings, becomes a debtor to the execution creditor. This was decided in Turner v. Fendall, 1 Cranch, 117. Chief Justice Marshall there says: "Has money, not yet paid to the "creditor, become his property? That is, *although "his title to the sum levied may be complete*, has he "the actual legal ownership of the specific pieces "of coin which the officer may have received? On "principle the Court conceives that he has not this "ownership. The judgment to be satisfied is for "a certain sum, not for the specific pieces which "constitute that sum, *and the claim of the creditor "on the sheriff seems to be of the same nature with "his claim under the judgment, and one which may "be satisfied in the same manner.* No right would "exist to pursue the specific pieces received by the "officer, although they should even have an ear-

"mark; *and an action of debt, not of detinue, may "be brought against him if he fails to pay over the "sum received* or converts it to his own use. It "seems to the Court that a right to specific pieces "of money can only be acquired by obtaining the "legal or actual possession of them, and until this "is done there can be no such absolute ownership "as that an execution can be levied on them. A "*right to a sum of money in the hands of a Sheriff "can no more be seized than a right to a sum of "money in the hands of another person*, and how-"ever wise or just it may be to give such a remedy, "the law does not appear yet to have given it."

In the case quoted from, the plaintiff in execution had sued the Sheriff for failing to turn over the money collected on his execution, and the Sheriff sought to defend on the ground that he had in his hands an execution in favor of a judgment creditor of the plaintiff. The Court held that that was no defense to the action, and that the only way in which the officer could have protected himself was by paying the money into court in obedience to the mandate of his writ, in which event the Court could have ordered the money to be paid to the second creditor, and such order would have been a defense to the Sheriff.

The specific money collected by the Sheriff belongs to him in his official capacity, and if it is lost before payment to the judgment creditor, the loss falls on the officer. For example, if he deposits it in a bank which fails. Phillips v. Lamar, 27 Ga., 228; Shaw v. Bauman, 34 Ohio St., 32.

The rule is the same if it be stolen from him. Gilmore v. Moore, 30 Ga., 628; United States v. Dashiell, 4 Wall, 182 (case of U. S. Paymaster).

(c.) The execution sale satisfies the debt.

Section 1369 of the Code of Civil Procedure of

the State of New York, speaking of an execution, reads as follows:

"It must, except in a case where special provis-"ion is otherwise made by law, substantially re-"quire the Sheriff to *satisfy* the judgment, out of "the personal property of the judgment debtor; "and, if sufficient personal property cannot be "found, out of the real property, belonging to him "at the time when the judgment was docketed in "the clerk's office of the county, or at any time "thereafter."

The question which arises under this Section of the Code is, when is such a judgment *satisfied?* The mere levy is not a satisfaction. The satisfaction is complete when the title to the goods levied on is changed by the act of the Sheriff. U. S. v. Dashiell. 3 Wall., 688.

The Court there say: "When the property is lost "to the debtor in consequence of the legal measures "which the creditor has pursued, '*the debt*,' says "Bronson, Ch. J., '*is gone although the creditor "may not have been paid.*' Under these circum-"stances the creditor must take his remedy against "the officer, and if there be no such remedy he must "bear the loss. Taylor v. Hill, 4 Hill, 621."

It necessarily follows that when a Sheriff has sold the goods levied on, and received the purchase money therefor, the judgment is satisfied and the debt is gone although the money has not yet been paid to the creditor. If the debt is paid by the receipt of the money by the Sheriff, the money while in his hands, is certainly not the property of the judgment debtor, and is therefore not affected by any lien, as contemplated by Section 67, *f*, but it is the property of the creditor as the Sheriff becomes his debtor for the same

That it is the receipt of the money by the Sheriff, and not by the creditor, which satisfies the judgment and pays the debt, is shown by the N. Y. Code of Civ. Pro., Sec. 1266, which provides, that "a Sheriff upon being paid the full amount due "upon an execution in his hands, must *immediate-"ly* endorse thereupon a *satisfaction* thereof."

In the State of New York it is well settled that a Sheriff collecting money under an execution, becomes a debtor to the creditor for the amount collected, and thereby the latter acquires a cause of action against him for money had and received without demand.

Brewster v. Van Ness, 18 Johns, 133; Dygert v. Crane, 1 Wend., 534; People v. Dunning, 1 Wend., 16; Walden v. Davidson, 15 Wend., 575; Denton v. Livingston, 9 Johns, 96; Armstrong v. Garrow, 6 Cow., 465; Townsend v. Olin, 5 Wend., 607.

The creditor recovers in such an action not only the amount collected by the Sheriff, but interest thereon as on any other debt.

Slingerland v. Swart, 13 Johns., 225.
Crane v. Dygert, 4 Wend., 675.

The Sheriff, therefore, is in the same position as a bank to whom a depositor has paid money. The depositor loses his title to the specific moneys which he deposits in the bank, even if they can be identified, and they could not be levied on under an execution against him even if the bank were to pick them out and set them aside for the purpose of such levy. Carrol v. Cone, 40 Barb. (N. Y.), 220; but he has a cause of action against the bank for the amount of his deposit, and his *claim* against the bank could be attached as a chose in action.

It has been held that the claim of a judgment creditor against a Sheriff for money collected by

the latter under the former's execution, can be attached as the creditor's chose in action. Wehle v. Connor, 83 N. Y., 231.

(d.) The Sheriff is the agent of the creditor.

The Sheriff in collecting the money has acted as the agent of the execution creditor. The money when paid to or collected by him is regarded as money paid to or collected by the execution creditor, and if the Sheriff fails to pay it over, the creditor can sue him just as any principal can sue a defaulting agent as for money had and received when he fails to pay over money collected by him.

In Nelson v. Kerr, 59 N. Y., 224, the Court say: "The Sheriff in collecting an execution acts as the "officer of the Court whose process it is, and also "as *agent*, appointed by law, of the party who seeks "by aid of the writ to obtain satisfaction of the "debt or thing awarded by the judgment. *The "money collected by the Sheriff belongs to the "plaintiff. The Sheriff, when he receives it, takes "it as the agent of the party who has the judgment, "and it is money had and received by him to the "plaintiff's use.*"

So clearly is the money collected by the Sheriff on execution the property of the execution creditor, that if the Sheriff has by mistake paid the money over to a third party, the execution creditor and not the Sheriff, can sue the latter for the money as his own.

Kingston v. Eltinge, 40 N. Y., 391.
Haebler v. Myers, 132 N. Y., 363, 369.

In the Kingston Bank case, *supra*, the Court say at page 395: "*The money thus received by the "defendant was the plaintiff's money. That it "did not belong to the defendant follows neces-*

"*sarily.*" The "plaintiff" here referred to, was a creditor holding a senior execution, and the "defendant" was a creditor holding a junior execution, the Sheriff having by mistake paid the money made by him under the first execution to the party holding the second execution.

(e) *The creditor may sue for the money as soon as it is made, even before the return day.*

The learned District Judge in his opinion herein admitted the correctness of the foregoing principles, but denied their application to the case at bar because the return day of the execution was subsequent to the filing of the petition in bankruptcy. Thus he says, at page 68 of the record: "There is no doubt that by the law of this State, "moneys collected by a sheriff through a sale on "execution, are in a certain sense the property of "the plaintiff, provided the proceedings are valid "(Nelson v. Kerr, 59 N. Y., 224; Kingston Bank "v. Gelting, 40 N. Y., 391, 395; Wehle v. Connor, "82 N. Y., 231), but not completely so, nor subject to levy against him until paid over (Baker v. "Kenworthy, 41 N. Y., 215; Turner v. Fendall, "1 Cranch, 134). But the execution creditor is "not entitled to the specific moneys, nor can he "maintain any action against the sheriff for not "paying them over, until either the return day of "the writ of execution has passed, or the sheriff "has made return of the writ. Not until then can "the creditor have either possession, or the right "of possession. The sheriff is not the mere agent "of the creditor, but an officer of the law as well, "who may pay the money into Court along with "the return of the writ (Nelson v. Kerr, *supra.* Turner v. Fendall, 1 Cranch, 134-137.)"

We do not think that the rule laid down by Judge Brown applies to a case where the Sheriff has made the money before the return day.

Rogers v. Sumner, 16 Pick., 387.
Morland v. Pellatt, 8 B. & C., 722, 727.
Higgins v. McAdam, 3 Y. & J., 1, 13.

If it does, it is of no importance because the fact that the creditor cannot sue until the return day, in no way impairs his right against the sheriff as his debtor. His rights are not different from those of the holder of a promissiory note or other debt before maturity.

(*f*) *If the return day occur before the adjudication it is sufficient, even though after the filing of the petition in bankruptcy.*

The fallacy of Judge Brown's position, however, is in assuming that the accruing of the creditor's right of action consequent upon the expiration of the return day, must occur before the filing of the petition in bankruptcy. The date of the adjudication, is the time fixed by the present act for the vesting of title in the trustee. Under the Act of 1867 the title to the bankrupt's property vested in the assignee by the assignment to him, but related back to the commencement of the proceedings in bankruptcy. Act of 1867, Sec. 14. Under the present act the title vests in the trustee upon his appointment and qualification, and relates back to the date of the adjudication of bankruptcy and no further. Act of 1898, Sec. 70-a, which is as follows: "The trustee of the estate of a bankrupt, "upon his appointment and qualification, and his "successor or successors, if he shall have one or "more, upon his or their appointment or qualifica- "tion shall in turn be vested by operation of law "with the title of the bankrupt, *as of the date he "was adjudged a bankrupt except*," etc.

The creditor's title, therefore, depends on priority, only to the adjudication.

(*g*) *Such was the fact in the case at bar.*

The execution of Clarke was dated March 6th, 1899, and was returnable sixty days from its date, viz., May 6th, 1899 (Rec. 25). The date of the filing of the petition in bankruptcy was April 13th, 1899 (Rec. 9), and the date of the adjudication was June 15th, 1899 (Rec. 9). The execution creditor, Clarke, therefore, became entitled to a right of action against the sheriff for the money in his hands at least a month and nine days before the date of the adjudication in bankruptcy.

(*h*) *The Act of 1841 vested title as of the date of the adjudication.*

The Act of 1898 in this respect resembles the Bankrupt Act of 1841. Section 3 of that act provided that the property of the bankrupt should "by mere operation of law, *ipso facto, from the "time of such decree*, be deemed to be divested "out of such bankrupt, without any other act, as- "signment or other conveyance whatsoever; and "the same shall be vested, by force of the same "decree, in such assignee as from time to time "shall be appointed by the proper Court for this "purpose."

Under that act it was held that any transfers of the bankrupt's property, or any rights or liens obtained thereon between the time of filing the petition and the decree of bankruptcy were valid and binding on the assignee.

Ex parte Bennett, 1 Penn. L. J., 145; 3 Fed. Cases, 203.

Dudley's Case, 1 Penn. L. J., 302; 7 Fed. Cases, 1150.

Miller v. Black, 1 Barr., 420.

Smith v. , 4 Edw. Ch. (N. Y.), 653.

Berthelon v. Betts, 4 Hill (N. Y.) 577.

In Buckingham v. McLean, 13 How., 151, 169, Mr. Justice Curtis said, that under the Act of 1841 the creditor could "enter up a judgment and issue "execution, and by levy acquire a valid lien, down "to the very moment when the title of the assignee "began."

A different result was arrived at under the Act of 1867, but the reason was that by the provisions of Section 14 of that Act the title of the assignee expressly related back from the time of the assignment, to the commencement of the proceedings in bankruptcy.

(*i*) *The present law, in this respect, is like the Act of 1841.*

In Bush on Bankruptcy, 385, that author quotes from a report of the House Committee of Congress on the Judiciary to Congress on the present act as follows: "Under Sec. 70, an important change "has been made from the former laws, as well as "from proposed legislation. Under the Act of 1867, "as interpreted by the Courts, it was held that "the title of the bankrupt's property vested in the "assignee as of the date of the filing of the pe- "tition in bankruptcy. This bill provides that "the trustee shall 'be vested by operation of "'law with the title of the bankrupt as of the date "'he was adjudged a bankrupt.' By this change "the alleged bankrupt can sell and convey a per- "fect title up to the date of the adjudication, and "the purchaser does not buy at his own risk and "in danger of having secured an imperfect title by "reason of an adjudication which may be subject "(subsequent) to the purchase. It does not follow "that because a petition is filed against a person "in the bankruptcy Court he will be adjudged a "bankrupt, and it seems but proper that the pub- "lic in dealing with him until he is adjudged a "bankrupt should deal without fear of loss or "danger as to title."

These considerations, which prompted Congress to make the date of the adjudication, that of the acquisition of title by the trustee, influenced it also to make that date the one on which the judicial liens mentioned in Sect. 67, Subdivisions *c* and *f*, should be dissolved or become null and void.

Therefore, even under the reasoning of Judge Brown above quoted, the execution creditor, Clarke, acquired immediately after the return day of the execution, a perfect right of action against the Sheriff for the money in his hands, which was not affected by the previous filing of the petition, and certainly could not be, by the adjudication which occurred over a month afterwards, and if the Sheriff had not been restrained by the injunction issued by the learned Judge, he would have been perfectly justified in paying over that money upon the return day to the execution creditor, Clarke, or into Court for his benefit in obedience to the mandate of the writ of execution, notwithstanding the previous filing of the petition in bankruptcy.

(*j*) *Before sale, the execution creditor has no property rights.*

The property right of an execution creditor in the proceeds of his execution arises only *after* sale has been made and the money collected by the sheriff. *Before* that time he has no right of property whatever in the goods levied upon. In the case of an injury to those goods by a wrongdoer or loss of their possession by the sheriff, the latter or the judgment debtor can sue, but not the creditor. The latter can sue in a certain case provided for by statute in New York, *but not at common law.*

Scott v. Morgan, 94 N. Y., 508, 515.

We have shown above that *after* the money has been received by the sheriff, the right of action against a third person wrongfully receiving it from the sheriff is in the plaintiff in execution.

Kingston Bank v. Eltinge, *supra*.
Hoebler v. Meyers, *supra*.

(*k*) *In case of loss of the property levied on, however, it falls on the creditor, not on the debtor.*

It follows from the identification of the execution creditor with the sheriff as principal and agent by operation of law that if the property levied on is injured, lost or destroyed, by act of the latter, the loss as between the creditor and the debtor, falls on the former and not on the latter. The execution is, in that event, deemed satisfied to the extent of the property levied on, and the claim of the creditor to recover his debt, thereafter exists against the sheriff and not against the execution debtor.

Peck v. Tiffany, 2 N. Y., 451.
U. S. v. Dashiell, 3 Wall., 688.

Where a sheriff misappropriates money collected by him on an attachment, the plaintiff must bear the loss. Matter of Dawson, 110 N. Y., 114. Judge Earl says in that case at page 117: "The "question now to be determined is, who is to bear "the loss of the sheriff's misconduct and default, "the plaintiffs or the defendant? We think the "loss should fall upon the plaintiffs. If this "money had been seized by virtue of an execu- "tion and the defendant had been deprived there- "of, it is well settled that the loss would fall upon "the plaintiffs, and that to the extent of the prop- "erty thus taken the judgment and execution "would be satisfied. (People v. Hopson, 1 Denio. "574; Peck v. Tiffany, 2 N. Y., 451)."

And again on page 118:

"If this money had been seized by virtue of an ex-
"ecution, *it would at once have operated as a pay-*
"*ment pro tanto upon the execution.* Here, in theory
"of law, the money is in the possession of the sher-
"iff, and when execution was issued to him it was
"at once applicable thereon and *must be deemed*
"*to have been so applied.* If the sheriff had been
"found within his county, and the execution had
"actually been delivered to him, he could not have
"returned the same unsatisfied but could have been
"compelled to return the same satisfied, as to the
"amount of money received by him upon the attach-
"ment. (Code, Sec. 708.) And such a return would
"have been conclusive in favor of the defendant,
"*and would have left the plaintiffs with their*
"*remedy against the Sheriff for money received*
"*by him.*"

(*l*) *Collection by the Sheriff is payment to the execution creditor.*

In other words, the sheriff being the agent of the execution-creditor, a payment to the former is in law a payment to the latter. All that remains to be done after such payment is for the sheriff to turn the money collected by him over to the execution creditor, and with the transaction between the sheriff and the execution creditor the execution debtor has nothing to do. After the money collected under the execution has come into the hands of the sheriff the execution debtor's debt is paid just as though he had himself paid it over to an agent or attorney of the creditor. The consequence is that when this money has been received by the sheriff it is no longer the property of the debtor; there is no lien upon it for anybody. It is the property of the creditor whose only claim thereafter is against the sheriff as his collecting agent.

Such being the status of the fund, Section 67 of the Bankrupt Law does not apply to it. It is no more to be regarded as "property of the debtor affected by a lien" while in the hands of the sheriff than if it were in the hands of the execution creditor's attorney or other agent.

Hoover v. Wise, 91 U. S., 308.

This exact point has been decided under the present law *in re* Easley, 93 Fed. Rep., 419, in the Western District of Virginia. The Court there held that where a judgment has been recovered in a state Court, execution issued and levied upon personal property and sale thereunder made by the sheriff before the commencement of proceedings in bankruptcy against the debtor, the proceeds of sale remaining in the hands of the sheriff are beyond the jurisdiction of the Court of bankruptcy and he will not be enjoined from paying the same to the execution creditor.

The case *in re* Franks, 95 Fed. Rep., 635, cited by Judge Brown in his opinion (Rec., 68), to show that the proceeds of the sale take the place of the property levied on, is not in point, because that was the case of an attachment which differs from an execution in this respect. The case of *in re* Fellerath, 95 Fed. Rep., 121, also cited by the learned Judge (Rec., 68), is so imperfectly reported, the date of the execution sales and of the proceedings in bankruptcy not being given, that the point decided by it is indeterminate.

(*m*) *Sec. 70, subdivision a, clause 5 of the Bankrupt Law conclusively supports our contention.*

This clause provides that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt to all "property

"which prior to the filing of the petition he could "by any means have transferred, or which might "have been levied upon and sold under judicial "process against him." That applies, clearly, to property of the bankrupt which at the date of the filing of the petition is in the custody of the Sheriff under the levy of an execution. Such property comes directly within that description and it passes to the trustee under the operation of Sec. 67, Subdivisions *c* and *f*, freed from the lien of the levy. The description mentioned, however, does not apply to a sum of money in the hands of the Sheriff made by him under an execution prior to the filing of the petition. That money could not by any means be transferred by the bankrupt, neither could it be levied on or sold under judicial process against him at the time of filing the petition, for the simple reason, as above shown, that the right to recover it from the Sheriff is in the creditor and not in the debtor. The trustee, therefore, can in no event take any title to it, and it is therefore exempt from the operation of the bankrupt law.

II.

The English Bankruptcy Act of 1825 has received the same construction.

The point which we urge has arisen with regard to the bankruptcy act 6 Geo., 4, c. 16, s. 108, a section which an English Judge said had occasioned more litigation within a few years than any other act of Parliament.

Gordon v. Sanctuary, 4 B. and Ad., 255, 266.

It was as follows: "*No creditor having security* "*for his debt*, or having made any attachment in

"London or any other place by virtue of any "custom there used, of the goods and chattels of the "bankrupt, *shall receive upon any such security* "or attachment *more than a ratable part of such* "*debt;* except in respect of any execution or extent "served and levied by seizure upon, or any mort- "gage of or lien upon any part of the property of "such bankrupt before the bankruptcy; provided "that no creditor, though for a valuable consider- "ation, who shall sue out execution upon any judg- "ment obtained by *default, confession or nil dicit,* "*shall avail himself of such execution* to the pre- "judice of other fair creditors, but shall be paid "ratably with such creditors."

Under this section numerous questions arose with regard to the rights of execution creditors obtaining judgments "by default or confession" under warrants of attorney and therefore coming within the proviso to the section. In Wymer v. Kemble, 6 B. and C., 479 (decided in 1827), a creditor having a warrant of attorney, entered up judgment thereon by *non sum informatus* or "default," and an execution was issued and levied on goods of the debtor, and these were sold by the Sheriff to the judgment creditor. About three weeks *after the sale* the debtor committed an act of bankruptcy by declaring himself a bankrupt, and was duly adjudicated such, and assignees were appointed. These took the goods from the execution creditor, claiming that under the proviso to the above section he could not "avail himself of his execution" by reason of the judgment being by default. The execution creditor sued the assignees in trover, and was held entitled to recover. Lord Tenterden said (page 483): "The seizure and "sale were perfect and complete before the act of "bankruptcy; the plaintiff therefore, by the

"general rules and principles of law, is entitled to "maintain this action, unless there be some legis- "lative enactment to prevent. It is said that the "6 G., 4, c. 16, s. 108, is such an enactment. "The statute is certainly obscure, but I think "that a reasonable construction has been given to "it by the plaintiff's counsel; It seems to me that "the plaintiff is not within the class of persons "therein mentioned. *He was not at the time of "the bankruptcy* 'a creditor having security' for he "had been paid by means of the execution before "the bankruptcy occurred. The section in ques- "tion first provides that 'no creditor having security " 'for his debt, etc., shall receive upon any such " 'security more than a ratable part of such debt;' "then follows an exception of certain cases 'except " 'in respect of an execution or extent served and " 'levied by seizure upon or mortgage of, or lien " 'upon, any part of the property of the bankrupt " 'before the bankruptcy.' That applies to "creditors having security, for a person who has "levied by seizure is such a creditor; he has a "security by his right to have the goods sold. "Then comes the proviso that 'no creditor, though " 'for a valuable consideration, who shall sue out " 'execution upon any judgment obtained by de- " 'fault, confession or *nil dicit*, shall avail himself " 'of such execution to the prejudice of other fair " 'creditors, but shall be paid ratably with such " 'creditors.' Now that only limits the exception, "and the exception applies only to cases falling "within the first part of the section, viz., those of "creditors having security. The present plaintiff "*was not at the time of the bankruptcy a creditor* "*at all*, and therefore, cannot be within the oper- "ation of the statute."

It will be noticed that the section did not say "having security *at the time of the bankruptcy;*"

but the Court construed it to have reference to that date, although no time at all was mentioned.

That the execution creditor's right to the money made by the Sheriff under the execution, attaches immediately upon its receipt by the latter, and cannot be affected by the fact that the assignee in bankruptcy becomes invested with title to the debtor's property between the time of the receipt of the money by the Sheriff and his payment thereof to the creditor, was decided under the same section, in Morland v. Pellat, 8 B. & C., 722 (A. D., 1828). In that case judgment was entered upon a warrant of attorney, and a *fi fa* issued, returnable May 2d. On May 1st the debtors paid to the Sheriff the money to be levied. On May 5th they committed an act of bankruptcy and on May 11th a commission issued. On May 19 the Sheriff paid the money to the execution creditor. The latter was sued by the assignees for the money. It was held that he was entitled to retain it, not being a creditor having security *at the time of the bankruptcy.*

BAYLEY, J., said (p. 725): "The plaintiff's title "was not complete until the 5th of May, and "before that time the writ issued by Pellatt was "returnable, and the Sheriff had received under it "the whole sum necessary to satisfy the debt. It "is said that the Sheriff was bound to keep the "money until the return of the writ. We need "not decide that, for here it was the duty of the "Sheriff to bring the money into Court on the 2d "of May, to be paid to the execution creditor. "He did not do so; but his neglect of duty cannot "vary the rights of the parties, and if he had "done his duty Pellatt would clearly on that day "have ceased to be a creditor of the bankrupts. "But without any actual payment of the money to "the creditor, I think that the seizure of the

"debtor's goods, and the conversion of them into "money, extinguishes the debt. * * * After "seizure and before sale, the Sheriff has a special "property in the goods, but the debtor has the "general property; up to that time, therefore, the "debt is not extinguished, and the judgment "creditor has a security for his debt. But after "sale, or payment of the money, the Sheriff be- "comes the debtor, and the original debt is ex- "tinguished. In this case, therefore, I am of the "opinion that the defendant was not a creditor at "the time of the bankruptcy, and consequently "was not within the statute. He has then a right "to retain the money paid to him by the Sheriff."

LITTLEDALE, J., said (p. 726): "A creditor may "be considered as having security by a judgment "or a seizure under *fi fa*. But had he security in "this case? The act of bankruptcy by one of the "partners was not until the 5th of May. The "whole of the money was paid to the Sheriff's "officer on the 1st day of May, before an act of "bankruptcy by either partner, and on the 2d it "was the duty of the Sheriff to return the writ and "pay over the money. From that time Pellatt "ceased to be a creditor having security. *But I "am disposed to go still further, and to say that "the Sheriff was liable to an action for money had "and received at the suit of the creditor as soon "as it was paid, and before the return of the writ*" (p. 727).

PARKE, J., said (p. 727): "It appears to us that "Pellatt was not a creditor of the bankrupts at the "time of their bankruptcy for, according to the "case of Peckinson v. Gilford (Cro. Car., 539), at "all events on the 2d of May the Sheriff was sub- "stituted for them as the debtor, although it may "be doubtful whether an action would lie against "him before the return day of the writ. Here,

"however, the title of Pellatt was perfect before "that of the present plaintiff's arose. In Clerk v. "Withers, as reported by Lord Raymond (1072), "Lord Holt says, that the levy is an answer to an "action of debt or *scire facias* on the judgment, "and he refers to Atkinson v. Atkinson, Cro. "Eliz., 390; but there the money had been paid to "the Sheriff. That point, therefore, may be some- "what doubtful, *but where the money has been "paid to the Sheriff there can be no doubt.* Pel- "latt, therefore, at the time of the bankruptcy, "was no longer a creditor of the bankrupt. Then "is he seeking *to avail himself of the execution?* "It is said that he is, because he cannot sue the "Sheriff without proving it. Supposing that it be "so, he is using it against the Sheriff, *and not "to the prejudice of other fair creditors of the "bankrupt.* Such an use of the execution is not "prohibited." It will be noticed that the Judge was speaking of the state of affairs at the date of the commencement of the bankruptcy proceedings

Section 81 of the same Act provided, "That all "executions against the goods and chattels of such "bankrupt, *bona fide* executed or levied more than "two calendar months before the issuing of such "commission shall be valid, notwithstanding any " prior act of bankruptcy by him committed."

It was held in Godson v. Sanctuary, 4 B. & Ad., 255 (1832), that by virtue of Section 81, an execution levied prior to the two months upon a judgment taken by confession upon a warrant of attorney or otherwise, was not affected by Section 108, and that that section applied only to executions levied upon warrants of attorney within the two months prior to the commission, and affected such executions only when there had not been a sale prior to the issuing of the commission in bankruptcy; one of the Judges saying: "That

when the judgment is by default or confession, then, to entitle the creditor to a preference *'there must have been a sale* as well as a seizure' " (*id.*, 264). During the existence of Sections 81 and 108 above mentioned, the case of Higgins v. McAdam, 3 Y. & J., 1, was decided in 1829. The Court there held that Section 108 only applied to executions on judgments by default levied within two months prior to the bankuptcy, yet that a creditor having such an execution should not be forbidden to avail himself of his execution if he had passed out of the stage of a creditor having security for his debt before the issuing of the commission in bankruptcy through the medium of a sale under his execution. He would only lose the benefit of his execution if he was such creditor having security at the time of the commission.

The statute 2 & 3 Vict., c. 29, was substantially the same as 6 G., 4, c. 16, s. 81, above quoted, except that it dispensed with the two months prior limitation and validated *bona fide* transactions and executions executed before the *fiat* in bankruptcy. In Whitmore v. Robertson, 8 M. & W., 463 (1841), it was held that under the 2 & 3 Vict., c. 29, an execution issued on a judgment entered on a warrant of attorney and executed by seizure before the *fiat*, but not completed by sale until after that event, was still affected by Section 108 of 6 G., 4, c. 16, and that the levy was avoided by the *fiat*. Parke B., there says of the latter section: "The "costruction put upon that section by several cases "having been, that if the plaintiff was a creditor "of the bankrupt at the time of the act of bank- "ruptcy, he had no priority, *and he was such "creditor of the bankrupt, until, by the actual sale "of the goods, the Sheriff became liable to him for "the proceeds of the sale.*"

This case was followed in Skey v. Carter, 11 M. & W., 571 (1843), and Tindal C. J., there repeats the statement that where a sale under the execution has taken place before the *fiat*, the execution is not invalidated by the *fiat* because the execution creditor has in consequence of the sale ceased to be "a creditor having security for his debt" (*id.*, 574, 575).

In Whitmore v. Greene, 13 M. & W., 104 (1844), it was held that where the seizure and sale under the execution both took place before the *fiat*, the creditor was entitled to the benefit of his execution notwithstanding he had notice of a prior act of bankruptcy, and that Section 108, 6 G., 4, c. 16, did not apply. Pollock, C. B., says at page 112: "If the fiat intervenes before a sale, the execution "plaintiff is not entitled, because he was still a "creditor of the bankrupt at the time of the *fiat* " * * * * and consequently is within the pro- "viso of the 108th Section, and is only to be "relieved ratably. If the *fiat* is after the sale, the "execution plaintiff is not a *creditor* of the bank- "rupt at the time of the bankruptcy, that is, the "*fiat*, and is entitled to the preference which his "execution gives him."

In Buckingham v. McLean, 13 How., 150, which was decided under the Bankrupt Act of 1841, then repealed, Mr. Justice Curtis says that the object of Section 108 was to prevent a creditor from taking a judgment by confession before the proceedings in bankruptcy. Thus he says at page 169, speaking of our Act of 1841: "It is true, this "construction would put it in the power of "creditors, by taking a bond or warrant of attorney, "while the debtor was solvent and did not contem- "plate bankruptcy, to enter up a judgment and "issue execution, and by a levy acquire a valid

"lien, down to the very moment when the title of "the assignee began. But this was undoubtedly so "under the statute of James, which, like ours, "contained no provision to meet this mischief; and "it became so great that, by the 108th Section of "the revising Act of 6 Geo., IV., it was enacted, "that 'no creditor, though for a valuable consider- " 'ation, who shall sue out execution on any judg- " 'ment obtained by default, confession or *nil dicit*, " 'shall avail himself of such execution, to the pre- " 'judice of other fair creditors, but shall be paid " 'ratably with such creditors.' If the Bankrupt "Act of 1841 had continued to exist, a similar ad- "dition to its provisions would doubtless have "become necessary."

Notwithstanding, as Mr. Justice Curtis correctly observes, that the purpose of Section 108 was to prevent creditors from availing themselves of the levies of executions which they had obtained before and down to the commencement of the bankruptcy proceedings, the construction of all the English Courts, as we have shown, was that it only forbade them from availing themselves of levies which existed as liens at that time and did not apply to liens previously merged into a sale.

The application of these cases to the one at bar we understand, is to be this: Section 108 above quoted, had provided that a creditor having security which consisted of the levy of an execution founded on a judgment by confession, *e. g.*, one obtained under a warrant of attorney, would lose the benefit thereof by the issuance of a *fiat* in bankruptcy against his judgment-debtor, and he could only come in ratably with other creditors. Sec. 81 practically avoided levies made within two months prior to the commencement of bankruptcy proceedings. The Courts, however, made this distinction, that if the execution had proceeded

simply to the stage of a levy and no further, at the time of the bankruptcy, it was avoided by the *fiat*, because the plaintiff in execution was "a creditor having security for his debt," but that if the execution had proceeded to the stage of a sale of the goods, even though the Sheriff still held the proceeds of the same, he was no longer a creditor, and would therefore not lose the preference which he had obtained by his execution. In other words, the question was not whether he *once had been* a creditor having an execution within the inhibited time before the *fiat*, but whether he was such at the time of the *fiat*. This is what we claim in the case at bar, that the question is not whether within the four months prior to the filing of the petition there has been "property of the debtor affected by the levy or other lien," but whether that is the case at the time of the adjudication, or at least at the time of the filing of the petition. If at that time the goods levied on have already been sold, and the proceeds are in the hands of the Sheriff, the plaintiff in execution is no longer a creditor, the defendant in execution is no longer a debtor, and the proceeds in the Sheriff's hands are not "property affected by a levy or other lien," but belong to the judgment creditor as his own property, and consequently the Bankrupt Act does not apply to that state of affairs.

III.

The words "null and void" in Section 67, subdivision f, relate to the time of the adjudication in bankruptcy, and are to be construed as having a present and not a retroactive operation.

The theory upon which the learned U. S. Circuit Court of Appeals decided this case was different

from that of the District Judge, and was in effect that the adjudication of Kenney as a bankrupt related back to the levy upon his property, although it had in the meantime been consummated by the sale, and rendered it (the levy) null and void, and that therefore the sale and collection of the proceeds thereof rested upon null and void proceedings, and the money took the place of the property sold, and was still the property of the bankrupt and passed to his trustee (Rec. 73-74).

The fallacy involved in this position is that in endeavoring to supply certain words omitted in Sec. 67, subdivision "f," it inserts the wrong ones.

Between the words "shall be deemed" and "null and void" certain words should be inserted to supply the context. Mr. Justice Lacombe construes the phrase as though it should read "shall be deemed *to have been* null and void." We believe that it should read "shall be deemed *to be* null and void." The same construction should clearly be given to the words in the same paragraph "shall be deemed wholly discharged and released from the same."

(*a*) *The retroactive construction makes an innocent sheriff a trespasser by his levy, through the the doctrine of relation.*

Under the construction of the learned Court below, a Sheriff who in good faith and in obedience to the command of the Court, has levied his execution upon the property of the debtor, and sold the same, and paid the money collected by him over to the creditor, can be compelled in case the debtor is thrown into bankruptcy within four months thereafter, to pay the money made by him to the trustee in bankruptcy, or to pay the value of the property, because his proceedings, though valid at the time, have by relation back of the ad-

judication become null and void. Such a rule carried to its legitimate conclusion would stop the enforcement of judgments for the collection of money in every Court throughout the United States, for no sensible Sheriff could be expected to undergo such a risk.

That we have not misquoted Mr. Justice Lacombe will be shown by reference to his opinion. Thus he says at page 73 of the Record: "How has this amount "(812,000) disappeared? Because Clark obtained "a judgment against the bankrupt and the Sheriff "under such judgment made a levy, which removed "the goods from the bankrupt's estate, and turned "them, through sale, into money. But under the "provisions of the bankrupt act the judgment and "the levy are to be held null and void. As a con- "sequence *the goods have been forcibly removed "without right from the bankrupt's possession "by Clark and the Sheriff.*" This must mean that the Court holds Clarke and the Sheriff to be trespassers *ab initio.* And again at page 74, "It "makes no difference whether the creditor and "Sheriff whose only title rests on 'null and void' "proceedings, hold the goods themselves or the "money which represents them, nor whether as "soon as the Sheriff sells under execution, it is his "duty to turn over the proceeds to the judgment "creditor, nor whether under the law of New York "the Sheriff holds the proceeds as the agent of the "creditor, nor that ordinarily such proceeds would "be the property of the judgment creditor. They "cannot be his property in this case *because the "only proceedings through which he can make out "title to retain their possession are such as the "bankruptcy Courts must hold to be null and "void.*"

The consequence of this rule, if it be correct, must be, that a Sheriff who levies an execution upon

the property of a debtor in obedience to the mandate of his writ, and sells the same and pays the money over to the creditor in good faith and without notice, becomes a trespasser, *ab initio*, and liable, as for a conversion, to the trustee in bankruptcy of the debtor if a petition in bankruptcy be filed against the latter within four months thereafter and be followed by an adjudication.

(*b*) *The doctrine of relation is not favored in its application to bankruptcy law.*

The words "shall be deemed null and void" contained in subdivision "f," refer apparently to liens existing at the date of the adjudication, and can only be construed to annul levies and other liens as of the date when they were first obtained, so as to override all intermediate acts completing their enforcement, by virtue of the doctrine of relation. It is well settled that an act which vests a title or right will not be construed to relate back to a prior act so as to make the title or right take effect as of the date of the first act when the rights of third parties which would otherwise be valid, are affected by such relation.

In Case v. DeGoes, 3 Caines, 261, 263, the New York Supreme Court speaking through Mr. Justice Thompson, afterwards a Justice of this Court, says: "It is a general rule with respect to the "doctrine of relation that it shall not do wrong to "strangers" (16 Vin. Abr., 293). This rule is "fully recognized in Menvill's case (13 Coke., 21), "where it is said, 'That by relation a thing may " 'be considered as annulled *ab initio*, betwixt the " 'same parties to advance a right, but the law will " 'never make such a construction to advance a " 'wrong or to defeat collateral acts which are law- " 'ful, and principally if they concern strangers.' " We contend that here the Court should not annul

the lien *ab initio* by *constructive* relation for the purpose of advancing the right of the trustee, when its effect will be to cut off the right which the debtor has obtained to have his debt satisfied by the sale, and the right of the creditor to the proceeds of such satisfaction.

In Johnston v. Jones, 1 Black, 210, 221, this Court says: "The doctrine of relation is a legal "fiction, intended to promote the ends of justice. "It is a general rule, that it shall do no wrong to "strangers. It is applied with vigor between the "original parties where justice so requires, but it is "never allowed to defeat the collateral rights of "third persons lawfully acquired (4 J. R., 234, "Jackson v. Bard; 3 Caines Rep., 262, Case v. De "Goes; 18 Vin. Abr., 287, Relation, B; 13 Coke, "21, Menvill's case; 7 Ohio. S. R., 291, Wood v. "Furgeson)."

"This limitation of the fiction of relation so as "to prevent it from doing injury to strangers or "defeating *mesne* lawful acts is the common lan- "guage of the books and it received a very par- "ticular illustration by Lord Hardwicke in the "case of Marlborough v. Godolphin, 2 Ves., 78. "He admitted the principle, that where a person "takes by execution of a power, he takes under "authority of the power; but there was no case, "he said, to maintain that he must take by rela- "tion, from the time of the creation of the power. "* * * These executions of power, says Lord "H., do not refer back, like assignments in com- "missions of bankruptcy, for the latter refer back "*by force* of the *Statutes of Bankruptcy* to avoid "mesne wrongful acts."

Jackson v. Davenport, 20 Johns., 537, 551-552.

The bankruptcy cases to which Lord Hardwicke refers are those where the Courts have been compelled to hold the title of the assignee in bankruptcy to relate back so as to cut off the intermediate rights of sheriffs, creditors, and purchasers by force of the *express* language of the bankruptcy law. Such language was contained in the Act of 1867, Sec. 14. *There is none in the present act.* Where the right of relation has been claimed by construction or implication only, under the bankruptcy acts, the Courts have uniformly refused to make any such construction to the injury of third parties. Thus in Rathbone v. Blackford, 1 Caines, 588, 590 (decided in 1803), the Supreme Court of the State of New York refused to apply the doctrine to the Bankrupt Act of 1800, because the Act did not contain words clearly expressive of such an intention on the part of Congress. The Court there say: "This relation to the moment of "committing an act of bankruptcy is considered as "one of the hardest cases of which the English law "admits, but was thought necessary to secure "creditors against fraudulent dispositions of their "property by bankrupts, whether by their own "acts, or under color of legal process (Per Lord "Hardwicke in Billion v. Hyde, 1 Ves., 328). It is "certain that men in tottering circumstances have "too much temptation as well as opportunity of "defeating their creditors of an equal distribution "of their effects. But while interposing checks "against practices of this kind, *we should be careful not unnecessarily to adopt fictions which "may operate with severity on other persons as "well as the bankrupt.*"

In Higgins v. McAdam, 3 Y. & J., 1, 10 (decided in 1829), the Court refused to make a construction of the English Bankrupt Act, which would cause the title of the assignee to relate back so as to cut

off the intervening rights of a creditor, claiming under a prior execution sale, to the proceeds thereof, the Court saying: "The relation back to any ante-"cedent period to make an act of bankruptcy, is a "case *strictissimi juris*, and ought not to prevail, "except where the words of the statute upon which "that construction is to be found, are clear and "without doubt. I do not know how to insert "words of relation in that part of the clause in "which the Legislature has omitted them."

The doctrine of relation in reference to the Act of 1867 was pressed upon this Court in the case of Conner v. Long, 104 U. S., 228, but the Court refused to assert any such principle and repudiated a long line of English decisions which had decided that under the Bankrupt Act of 13 Eliz. Ch., 7, the title of the assignee would relate back to a prior act of bankruptcy and make the Sheriff and the execution creditor wrongdoers for all intervening acts done by them under the execution although in good faith. The Court held that those decisions were a departure from the common law, and that the Bankrupt Act of 6 Geo., 4, ch. 16 (enacted in 1825), hereinbefore referred to, which established a different rule, was merely a legislative reversal of the decisions of the English Courts, and did not so much change as restore the law (*Id.*, 241-244).

We therefore feel fully justified in asserting that since subdivision "f," Sec. 67, does not contain express words of relation it should be construed to have reference only to liens existing at the date of the adjudication, and not to those which have become extinguished by prior sale, since the effect of the contrary construction would be to make an innocent Sheriff a wrongdoer, and deprive a *bona fide* and diligent creditor of a pay-

ment of his debt duly obtained before the bankruptcy proceedings through the remedy given to him by the law.

(*c*) *The retroactive construction makes Sec. 67, subdivision f, conflict with Sec. 60, subdivisions a and b.*

That the construction given by the Court below is incorrect, is shown by Sec. 60, paragraphs *a* and *b* of the act, which are as follows: "Sec. 60. Preferred Creditors.—(*a*) A person shall be deemed "to have given a preference if, being insolvent, *he* "*has procured or suffered a judgment to be entered* "*against him in favor of any person*, or made "a transfer of any of his property, and the effect "of the *enforcement of such judgment* or transfer "will be to enable any one of his creditors to obtain "a greater percentage of his debt than any other of "such creditors of the same class.

"(*b*) If a bankrupt shall have given a preference within four months before the filing of a "petition or after the filing of the petition, and "before the adjudication, and the person receiving "it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to "believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and "he may recover the property or its value from "such person."

If the reasoning of the Circuit Court of Appeals is correct, it was unnecessary and useless for Congress to enact Sec. 60, paragraphs a and b. Their effect is that the *enforcement of a judgment* obtained against a debtor within four months prior to the filing of the petition in bankruptcy against him shall be "*voidable by the trustee*" only in certain contingencies; first, if it be procured or suffered by the debtor to be entered against him;

second, if the effect of the enforcement of such judgment will be to give the judgment-creditor a preference; third, if the debtor intended thereby to give the creditor a preference; and fourth, if the creditor should have had reasonable cause to believe that it was intended thereby to give a preference. Now, the only way in which a *judgment* for the recovery of a debt can be "enforced" is, by the issuance of an execution, a levy of the same upon property creating a lien thereon, a sale of the property, and a payment of the proceeds thereof to the judgment creditor. If the mere fact that all of these steps were taken within four months prior to the filing of the petition in bankruptcy, renders all the proceedings "null and void" and makes the creditor and the Sheriff both liable to refund the money received by them to the trustee, then Sec. 60, so far as it refers to judgments, is absolutely unnecessary and ineffective.

In fact, if the Circuit Court of Appeals is correct, Sec. 60, subdivisions "a" and "b" are repealed by Sec. 67, subdivision "f," for the same reasons which moved the U. S Circuit Court of Appeals for the Seventh Circuit to decide that Sec. 67 c, which relates to the dissolution of judicial liens, was also repealed by subdivision f, and those reasons were that the respective provisions were antagonistic and irreconcilable, and that therefore, in any case of conflict between them, the former must give way and the latter prevail (*In re* Richards, 96 Fed. Rep., 935). This Court, however, in the case of Pirie v. Chicago Title & Trust Co., 182 U. S., 348, regarded those subdivisions of Section 60 as being in full effect. In that case Mr. Justice McKenna says: "Subdivisions 'a' and "'b' are concerned with a preference given by a "debtor to his creditor. Subdivision 'a' defines "what shall constitute it, and subdivision 'b' states

"a consequence of it—gives a remedy against it. "The former defines it to be a transfer of property "which will enable him to whom the transfer is "made to obtain a greater percentage of his debt "than other creditors. The latter provides a con- "sequence to be that the transfer may be avoided "by the trustee of the property or its value re- "covered, provided, however, that the preference "was given four months before the filing of the "petition in bankruptcy or before the adjudica- "tion, and the creditor had reason to believe that "a preference was intended. So far, so clear. If "the conditions mentioned exist, the preference "may be avoided. But if the person receiving the "preference did not have cause to believe it was "intended, what then? It follows that the con- "dition being absent, its effect will be absent. *In "other words, he may keep the property trans- "ferred to him, whether it be a complete or partial "discharge of his debt*" (446-447).

It is true that the learned Justice speaks in this quotation only of transfers of property, but "transfer of property" is inseparably connected in subdivision "a" with "judgment," and if he had supposed that the portion relating to judgments was repealed by Sec. 67 f, he would undoubtedly have stated that fact. In the recent case of Wilson Brothers v. Nelson, decided by this Court (7 Am. B'k'y Rep., 142), Sec. 60, subdivisions "a" and "b" are regarded as in full force and effect.

(*d*) *Sections 67 "f" and 60 "a" and "b," should be so construed as to stand together.*

That construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used, should be rejected if

an interpretation can be found which will give it effect (23 Am. & Eng. Ency. of Law, 309, 1st Ed.).

It is not competent for this Court to reject or disregard a material part of an Act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together (Rice v. Minnesota & N. W. R. R. Co., 1 Black., 358).

Statutes must be so construed as to admit all parts of them to stand if possible (Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U. S., 634).

It is a cardinal rule of statutory construction, that significance and effect shall, if possible, be accorded to every word, and that every part of the statute must be construed in connection with the whole, so as to make all the parts harmonize and give meaning to each (Washington Market Co. v. Hoffman, 101 U. S., 112).

No statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction (Cope v. Cope, 137 U. S., 682)

Statutes should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it (Bernier v. Bernier, 147 U. S., 242).

In Peck v Jenness, 7 How., 612, 623, Mr. Justice Grier says, with reference to the Bankruptcy Act of 1841: "But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the Legislature. One portion of a statute should not be construed to annul and destroy what has been clearly granted by another. *The most general and absolute terms of one section may be qual-*

ified and limited by conditions and exceptions contained in another, so that all may stand together."

The above canons of construction can only be applied and enforced in this case by construing Sec. 67, subdivision *f*, as referring only to judicial liens which are in existence at the date of the adjudication of bankruptcy, and Sec. 60, subdivisions *a* and *b*, as relating to such liens, which, prior to such adjudication, have in the progress of the enforcement of the judgments there mentioned, passed through the stage of sale. This construction will give each subdivision full and complete effect and will be in harmony with the language therein contained. If the Court should construe Sec. 67, subdivision *f* as applying to execution and judgment liens which have already become *functus officio* by a sale, it will bring it in conflict with Sec. 60, subdivisions *a* and *b*.

The differences between them are irreconcilable because the one avoids liens from the mere facts of their existence and of their having been obtained within the specified time, whereas the other avoids them only in the event of certain conditions being interposed. The later one must therefore repeal the other under the construction given to Sec. 67, subdivision *f* by the Courts below. It is very clear, however, that it was not the intention of Congress to repeal Section 60, as applied to the enforcement of judgments, but to have it stand in conjunction with Section 67, subdivision "*f*."

The District Judge who decided the case below, evidently does not agree with the Circuit Court of Appeals that the levy if obtained within the inhibited time is *ipso facto* null and void and fails to support the subsequent proceedings consequent thereon, for in a later case he decided that where a Sheriff had paid over the money made by a sale

under such a levy to the execution creditor before the filing of the petition, the trustee could not recover it from the creditor unless the transaction came within the provisions of Sec. 60, paragraph *b*, as an illegal preference. *In re* Blair, 102 Fed. Rep., 987. This decision was undoubtedly correct.

Judge Brown, in that case, fell, however, in our opinion, into two errors; 1st, in regarding the filing of the petition and not the adjudication as the event which terminates the right of the creditor to proceed any further with his execution; 2d, in not perceiving that the creditor's rights are fixed, beyond the interference of the bankruptcy proceedings by the prior execution sale and not alone by the payment to him by the Sheriff.

(*c*) *The trustee can take no rights through his injunction order.*

It may be claimed by the trustee that this money had not been paid over by the Sheriff even at the date of the adjudication. Our contention on this point is, that if such payment be necessary to fortify the right of the execution creditor against the claims of the trustee (which we do not concede), the trustee cannot take advantage of it in this proceeding, because it was his act, or rather that of the creditors who filed the petition in bankruptcy and whom he represents, which prevented the payment over, by their obtaining at the inception of the proceedings, an injunction from the District Court restraining the Sheriff from paying over the money to the execution creditor. The object of an injunction is to preserve rights, not to *create* them. No court by an injunction can create rights in favor of the party obtaining the injunction, which he would not otherwise have by operation of law. The Sheriff, at the time of the filing of the petition in bankruptcy was ready to pay

over the money, an injunction of the State Court which had theretofore prevented him from doing so having been dissolved; but before an order to that effect could be entered, the U. S. District Judge issued his injunction preventing such payment (Rec. 28-29). For the purposes of this proceeding, the Sheriff must therefore be considered as having immediately after the filing of the petition in bankruptcy, and before the service of the restraining order, and consequently before the adjudication, paid over the money in question to the creditor.

(*f*) *The maxim, expressio unius est exclusio alterius, applies.*

If subdivision "*f*" had contained no more than the general condemnation of judicial liens obtained within the prescribed time, which ends with the words "in case he as adjudged a bankrupt," there might be some doubt as to the proper construction. The Legislature, however, by continuing the sentence and proceeding to provide for the case of liens which exist at the time of the adjudication, and enacting that the property affected thereby, or, in the discretion of the Court, the lien itself should pass to the trustee, has thereby by implication asserted its intention that liens not then existing, but previously executed by sale, should not be affected by the adjudication. It presents a case for the application of the rule of interpretation, *Expressio unius est exclusio alterius*, which "is an universal maxim in the construction of statutes." United States v. Arredondo, 6 Pet., 691, 725.

In Herring vs. N. Y. L. E. & W. R. R. Co., 105 N. Y., 340, 389, the Court for example in discussing the question whether the New York Code of Procedure permitted injunctions and receivers *before* judgment in a certain class of actions, said:

"Section 444 made special provision for injunctions "and receivers *after* judgment, and thus forbade them by implication at an earlier stage of the action. The maxim *expressio unius exclusio alterius* applies."

In like manner we urge that since there existed the same necessity that Congress should provide remedies for the trustee, in the case of liens already *functus officio*, before the adjudication, as in the case of liens existing at the time of the adjudication, the fact that it provided for the latter and not for the former makes it a case for the application of the maxim, and shows that Congress did not intend to avoid liens discharged by sale before the adjudication.

(g) *Every bankrupt act which destroyed the rights of creditors gave remedies to the trustee.*

This consideration is strengthened by the fact that in every Bankrupt Act ever passed by Congress, including the present Act—excepting the Act of 1800, which did not avoid anything—whenever a provision has been made for avoiding a transaction of the bankrupt, a remedy has been expressly given to the assignee or trustee in reference to the matter. Thus Section 2 of the Act of 1841 avoided all payments, securities, etc., made or given by a bankrupt in contemplation of bankruptcy or for the purpose of preference, and expressly authorized the assignee to sue for and recover the same. This Section was enforced in Shawhan v. Wherritt, 7 How., 627. Section 35 of the Act of 1867 avoided all preferences given within four months prior to the filing of the petition, and expressly authorized the assignee to sue for and recover the property which was the subject of the preference, or its value. The enforcement of this section is illustrated in Michaels v. Post, 21 Wall.,

398. Section 60 of the present Act, which avoids similar preferences, gives a like remedy to the trustee, and Section 67, subdivision *f*, which avoids judicial liens obtained within four months prior to the commencement of the bankruptcy proceedings, gives a remedy to the trustee when the lien exists at the date of the adjudication.

(*h*) *The present Act gives no remedy as to judicial liens extinguished before the bankruptcy proceedings.*

In view of this policy of Congress thus repeatedly and constantly carried out, it is not too much to say that if it had intended that such liens should be avoided, when they had already become perfected by a sale and the proceeds thereof were in the hands of the creditor or of the Sheriff before the filing of the petition, it would have expressly given a remedy to the trustee to sue for and recover such proceeds. We therefore assert that its failure to give such a remedy affords conclusive evidence that it did not intend that liens thus perfected and extinguished by sale should be avoided by the bankruptcy proceedings subsequent to such sale.

IV.

Every provision of Sec. 67, Subdivision f, shows that the words "null and void" have no retroactive effect.

The first line of the subdivision avoids judgments and attachments by name, for the reason, doubtless, that the direct operation of an attachment or judgment upon the property of the debtor is to fix a lien thereon and no more. The intention of the subdivision is to avoid merely the *lien* of the attachment or judgment. (Doyle v. Heath, 4 Am. Bky. Rep., 705; *In re* Beaver

Coal Co., 6 *Id.*, 404.) When Congress came, however, to the subject of executions, it did not mention *them*, but only levies. The object of an execution is not only to fix a lien upon property, but to transmute the same into money for the purpose of satisfying the judgment on which the execution is based. As the intention of Congress was merely to avoid liens, existing at the date of the adjudication, it purposely omitted the word "executions," and only specified "levies" whose only effect is the fixing of a lien. Had Congress intended to make the adjudication retroactive and to avoid everything that had been done under the execution before that time, it would have enacted that all "executions" issued or levied within the prescribed four months should be null and void. Its failure to mention executions, shows to a demonstration, that it did not intend to interfere with an execution which already advanced beyond the stage of the "levy," and had been completed by a sale.

This point was expressly ruled by the Circuit Court of Appeals for the Fourth Circuit, in Botts v. Hammond, 99 Fed. Rep., 916. In that case there had been an attachment of personal property in the State court, a sale thereof under order of the Court, a judgment obtained against the attachment debtor and the proceeds distributed to the attachment creditors. The judgment was entered and the distribution had less than a month before the commencement of proceedings in bankruptcy and less than two months before the adjudication. The Court say at page 919, speaking of subdivisions "*e*" and "*f*" of Section 67: "Both of these subdi-"visions deal with the lien as existing. But in "the case before us the lien had been merged in "the judgment; the property had been sold under

"lawful orders of the Court, having full jurisdiction; "the money has been distributed and the lien "gone. There is nothing upon which the subdivis- "ions of this section can act or to which these pro- "visions can apply."

The further provision in subdivision "*f*" that "*the right under such levy*, judgment, attachment "or other lien shall be preserved for the benefit of "the estate and thereupon the same may pass to "and shall be preserved by the trustee for the ben- "efit of the estate," shows that the entire subdivision had nothing to do with liens exhausted by sale before the inception of the bankruptcy proceedings. In the case of such liens "the Sheriff is substituted for the debtor" (Higgins v. McAdam, 3 Y. & J. 1, 13; Morland v. Pellatt, 8 B. & B. 722, 727), and the right to proceed against the Sheriff as the sole debtor is not a "right under the levy" or other lien, even though such lien has once existed in the course of the proceedings which led to the sale. A "right under the levy" can only mean a right to proceed with the further enforcement of an existing levy, and not a right to sue the sheriff for money had and received (which is a right on the *sale*) except by a very strained and forced construction.

Moreover, there is nothing in the right to sue the sheriff that needs to "be preserved," as it exists until satisfied by payment to the creditor, and it is only extinguished after such payment. It will hardly be contended that the subdivision means that after and notwithstanding the payment by the sheriff to the creditor, the right against the sheriff shall be preserved to the trustee so as to make the former pay the debt twice. The meaning is that an *existing lien* may be preserved, and shall not become null and void.

Further confirmation of our views is afforded by the next sentence of subdivision "*f*:" "And the "Court may order such conveyance as shall be "necessary to carry the purposes of this section "into effect." This obviously refers to a conveyance by the creditor and not by the debtor. A conveyance by the latter would not transfer any right under the levy or other lien, and in fact would not transfer anything which was not already vested in the trustee by the provisions of Section 70. Now if the creditor has already received the money from the sheriff, he is, under the ruling of the Circuit Court of Appeals, liable to the trustee. Did Congress mean that he must "convey" a right of action against himself? It is clear that that case is not within the "purposes of the section." Yet it must be evident that if Congress had had in view liens already extinguished by a sale, it would have provided a remedy for that contingency also.

We come next to a case like the present where the sheriff still holds the money. Undoubtedly, there, the creditor has his right of action against the sheriff which he can "convey." Did Congress mean that that right should be "preserved" and "conveyed" and should "pass to the trustee?" If that be the case, the unlucky creditor loses his original debt against the bankrupt entirely, for the creation of the right of action against the sheriff has paid the debt against the original debtor either totally or partially so that when he is ordered to convey his right of action against the sheriff to the trustee, he will have nothing left.

Under our construction of subdivision "*f*" which makes it apply only to the case of liens existing at the time of the adjudication, the creditor although he loses his lien still retains his debt and can prove it in bankruptcy. Under the construction insisted on by the trustee he must lose the

debt entirely because his right of action against the sheriff cannot be "preserved" for the benefit of the estate, and yet at the same time be "deemed null and void" for his own benefit as against the original debtor. We must therefore conclude that Congress did not have in mind a case like the present in declaring liens null and void in subdivision "*f*," otherwise, in providing for the conveyance by the creditor of his right of action against the sheriff for the money in his hands, it would have made some provision to protect the former and resurrect his original debt against the bankrupt.

Subdivision "*f*" must therefore mean that only liens existing at the time of the bankruptcy, and not those already extinguished by sale, are to be either "deemed null and void" on the one hand, or "preserved" and "conveyed" on the other.

V.

The proviso to subdivision "f" of Section 67 does not militate against the construction of the petitioner.

This clause is as follows: "Provided, that noth-"ing herein contained shall have the effect to de-"stroy or impair the title obtained by such levy, "judgment, attachment, or other lien, of a *bona* "*fide* purchaser for value who shall have acquired "the same without notice or reasonable cause for "inquiry." The learned Courts below considered this proviso as decisive of the question in controversy, and as showing that Congress had in mind liens already extinguished by sale before the adjudication or filing of the petition in bankruptcy, and that the purchaser referred to is one who has bought at such a prior sale. We contend, however, that it plainly refers to a sale taking place *after the adjudication*, and as saving the rights of

purchasers for value who buy without notice of or reasonable cause for inquiry in reference to the adjudication.

It was proper and just for Congress to provide for such a contingency, for it might well happen that after an adjudication had been made in one state, an execution sale under a previous levy might take place in some distant state, and some innocent person without notice of the bankruptcy proceedings be entrapped into making an invalid purchase. In fact, such cases often occurred under the Act of 1867.

The use of the words, "without notice or reasonable cause for inquiry" shows that Congress did not have in mind in the proviso a sale occuring *before* the proceedings in bankruptcy, for how can a purchaser be held to have notice of or reasonable cause for inquiry with reference to an event that has never occurred, or of a thing which does not exist?

The Supreme Court of Maine, has held that the proviso to Sec. 67, "*f*" applies to a judicial sale occurring *after* the adjudication and protects an innocent purchaser but not the sheriff. Jones v. Stevens, 5 Am. Bktcy. Rep., 571.

It was not necessary for Congress to make a provision protecting an innocent purchaser at an execution sale made before the commencement of the proceedings in bankruptcy. Such sale would confer a right on the purchaser which it would be beyond the constitutional power of Congress to divest through the intervention of proceedings in bankruptcy subsequently commenced. A provision depriving an innocent purchaser for value of his rights in that manner, would deprive him of his property without due process of law within the meaning of the fifth amendment to the Constitution. The proviso, therefore, cannot be considered as applying to the case of such a purchaser.

The Act of 1867, Sec. 14, which provided for the dissolution of attachment liens, created within four months before the filing of the petition in bankruptcy, did not contain any saving in favor of innocent parties purchasing at an attachment sale, such as is often made before judgment in the case of perishable property. It was held in Conner v. Long, 104 U. S., 228, that where such sale occurred *after* the filing of the petition in bankruptcy, the purchaser was not protected; he was, however, saved harmless if the sale occurred *before* that event. The Act of 1867 in this respect therefore caused injustice to subsequent *bona fide* purchasers, and it was to prevent such injustice that the proviso to subdivision "f" of Sec. 67, in the present act was enacted. Mr. Justice Matthews says in Conner v. Long, *supra*, at page 231: "One consequence is, "that if property of the debtor, levied on under "such an attachment, has been sold prior to the "filing of the petition in bankruptcy, but there- "after the proceeds of the sale remain in the hands "of the sheriff, or have been applied before the "assignment to the payment of the judgment in "the attachment suit, the rights of the assignee "attach to the money and cannot follow the prop- "erty sold, for not being subject to the attachment "at the commencement of the bankruptcy proceed- "ings, the title *to the attached property is not "thereby transferred to the assignee;* but the at- "tachment being dissolved upon that event, the "right to the proceeds of the sale passes under the "assignment, released from the claims of all parties "to the attachment suit, as of the date of the "commencement of the proceedings in bankruptcy. "And in such a case the plaintiff in the attachment "suit, having received the proceeds of the sale on "his judgment, would be liable to an action by the "assignee for that sum of money had and received

"to his use; or, if it remained in the hands of the "sheriff, the assignee might become a party to the "action and obtain an order of the Court requiring "the amount to be paid directly to himself.

"Another result is, that if the property has been "sold under the attachment *after* the commence- "ment of the bankruptcy proceedings, *no title* "*passes by the sale*, for the property ceased, at "that time, to be the property of the bankrupt and "became the property of the assignee, a stranger "to the action and not affected by it; and both the "plaintiff in the attachment *and the purchaser at* "*the sheriff's sale*, would be liable to the assignee "for a conversion of his property; the one for hav- "ing caused its sale, *the other for having taken* "*possession of it as owner.*"

The observation of Mr. Justice Matthews, that where the property levied on under an attachment is sold by order of Court, the proceeds take the place of the property sold, does not apply to the case of an execution. In the case of an attachment the proceeds of the sale remain in the hands of the sheriff subject to the lien of the attachment which is conditional and dependent upon the rendition of judgment in favor of the creditor. Miller v. Bowles, 58 N. Y., 253, 256 (Decided under the Act of 1867). Pratt v. Law, 9 Cranch, 456, 497.

The attachment creditor's rights to such proceeds before judgment are exactly the same as they were with reference to the property attached before it was sold. In the case of an execution however, the sale absolutely at once satisfies the debt, and the right of the creditor to the proceeds in the hands of the sheriff is complete.

In Duffield v. Horton, 73 N. Y., 218 (cited in Conner v. Long, *supra*), a debt due the bankrupt had been attached before the filing of the petition,

and was paid by the debtor of the bankrupt to the sheriff *after* that event and before the assignment in bankruptcy, in good faith and without actual notice of the filing of the petition. He was obliged to pay it again to the assignee however as he had constructive notice of the bankruptcy proceedings by operation of law. Can it be doubted that if the payment had been made before the filing of the petition, the result would have been otherwise?

VI.

The creditor's rights under a prior execution sale are not opposed to the object of the Bankrupt Law.

There is nothing in the object of the Bankrupt Act which militates against our contention. The purpose of that Act is, to use the language of the Court in Clark v. Iselin, 21 Wall., 360, 377, in reference to the Act of 1867, "to secure equality of "distribution of that which insolvents have when "proceedings in bankruptcy are commenced, and "of that which they have collusively with some of "their creditors attempted to withdraw from rata-"ble distribution, with intent to prefer some "creditors over others."

Congress has seen fit to go further in the present law, than it did in that act or in any other previous act, and has enacted that the debtor's property existing at the time of the adjudication should go to the trustee free from any liens then existing obtained through legal proceedings within four months prior to the bankruptcy. But there is nothing in the letter or spirit of the act which evidences an intention on the part of Congress to take away from an innocent creditor that which has completely effectuated a payment of his debt, and in good faith become his own property through

the remedies which the laws give him prior to the filing of the petition in bankruptcy. Nothing but the clearest and plainest expression of the will of Congress should prompt the Court to take away from a creditor that, which the law and the facts, as they existed at the time, have made his own and to compel him to divest him of his own property in favor of the trustee in bankruptcy, by reason of facts occurring afterwards, and which were perhaps unsuspected and undreamed of at the time when the money was collected by the Sheriff. In Pirie v. Chicago, T. & T. Co., 182 U. S., 438, this Court construed the intention of the act to be, that a creditor should not be deprived of a payment received by him in good faith from the debtor although the latter was insolvent unless he desired to prove the balance of his claim. There is no reason why Congress should have entertained a different view with reference to a payment obtained in good faith through legal proceedings, and there is nothing in the act which can support an assertion that it entertained any such view.

VII.

The decrees of the U. S. Circuit Court of Appeals and of the U. S. District Court should be reversed, and the latter Court directed to order restitution by the trustee of the money obtained by him from the Sheriff to the execution creditor Clarke.

Respectfully submitted,

S. LIVINGSTON SAMUELS,
Counsel for Petitioner Clarke.

FILED
MAY 1 1902
JAMES H. McKENNEY,
Clerk.

No. 262. 51

Reply Brf. of Samuels for Petitioner

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed May 1, 1902.

No. 262.

EDWARD H. CLARKE,

Petitioner,

vs.

WILBUR LARREMORE, Trustee in Bankruptcy of RAYMOND W. KENNEY,

Bankrupt.

REPLY FOR PETITIONER.

S. LIVINGSTON SAMUELS,
Counsel for Edward H. Clarke,
Petitioner.

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

Supreme Court of the United States.

EDWARD H. CLARKE,
Petitioner,

against

WILBUR LARREMORE, Trustee in Bankruptcy of Raymond W. Kenney,
Bankrupt.

REPLY FOR PETITIONER.

I.

The statement made in the brief of the trustee, pp. 4 and 5, that Clarke's judgment was decided to be a preference, is erroneous. That point was not before the District Court and was not considered by it, nor by the Circuit Court of Appeals, as a reference to their opinions will show.

The petition of the trustee that the money in controversy be paid over to him, was founded solely upon the allegation that the judgment and levy were void, because they were obtained within four months prior to the filing of the petition in bankruptcy against Kenney (Rec. 39), and its prayer was in the language of Section 67 "f," and

the trustee admits that the order of the Court was made under the provisions of that section (Trustee's Brief, p. 2).

The case having been prosecuted in the Courts below under that theory, no endeavor can properly be made here to sustain the decree of the District Court under the idea of a preference which is a new and different theory, and which if it had been advanced would have been met with evidence on the part of the execution creditor.

> Home Fire Insurance Co. v. Western Transportation Co., 51 N. Y., 93.
> Stapenhorst v. Wolff, 65 N. Y., 596.
> Snider v. Snider, 160 N. Y., 151, 155.

Regarding the question of preference as being in the case, however, a reference to the testimony will make it appear that there was nothing to show the facts, which under Section 60, Subdivisions a and b are requisite to constitute a preference, namely, that the debtor intended to prefer the creditor and that the judgment creditor had reason to believe that it was intended to give him a preference.

Kenney had testified before the referee at his examination by his creditors, that Mr. George Bell (Clarke's present attorney herein), served upon him the summons and complaint in Clarke's action in the State Court (Rec. 57); that the consideration of the notes sued on and which he gave to his wife, was cash on the date they were drawn during the year 1894, which money was all put into his business. It was in the neighborhood of $15,000, and he had paid her very little thereon. She transferred the notes to her father, Mr. Clarke, and the latter sued him. He did not defend. Mr. Abbett agreed to hold it off and he did not do it (Rec. 58).

It may be remarked here that Mr. Abbett was largely interested in Kenney's business as the contract between him and Kenney shows, (Rec. 45). It was claimed that he was a partner of Kenney, (Rec. 42), and he took considerable part in enabling the latter to raise funds for the benefit of the business, (Rec. 43).

Kenney further testified that after the action was brought he went down to the attorney's office and told him that there was no necessity for bringing that suit; that they were perfectly solvent and were not pressed, but only by one or two creditors for a very small amount. He didn't live with his father in law, and does not know when his wife transferred the notes to him. He didn't ask her (Rec. 58).

After the suit was brought he spoke to his wife and got her to write to her father and get him to hold off. There was no conversation between his father in law and himself in reference to the bringing of the suit. There was no conversation between his wife and himself until after the papers were served (Rec. 59).

Previous to the suit, Mr. Clarke did not make a demand for the money, but made a demand for the interest on it; he had no arrangements with Mr. Clarke in relation to the obtaining of this judgment, and a sale of these goods. He did not know anything about the bringing of this suit, and had no transaction or conversation relative to the bringing of the suit until he was served with the papers. His wife did not know anything about it (*Rec. 59.*)

He further testified at the creditors' examination, that on the day before Clarke's judgment was taken, Mr. Abbett requested him to take stock and give him a detailed account of the business at that time; his book-

keeper drew off a statement from the books. The examination of the books was made on Saturday or Sunday before the judgment, namely, March 6th, 1899. He never had an opportunity of showing that statement to Mr. Clarke or to Mrs. Kenny. The object of going over the statement and having it accurate was to satisfy Mr. Abbett and Mr. Clarke that the business was perfectly solvent and was running all right (Rec. 61).

We believe that Section 60, subdivisions a and b are practically the same in legal effect as Sections 35 and 39 of the Bankrupt Act of 1867, and that under the construction given to that act the above facts would not constitute a procuring or suffering of a judgment, nor an intent to give a preference, nor would they show that Clarke knew that Kenney intended to give him a preference if such an intent existed.

Wilson vs. City Bank, 17 Wall, 473.

II.

The contention of the respondent that the adjudication of Kenney as a bankrupt is conclusive as showing that Clarke came within the provisions of Section 60, subdivisions a and b as a preferred creditor, is unfounded. That adjudication was not made under that Section, but under Section 3, subdivision a, clause 3, defining an act of bankruptcy, which lacks several elements specified in the former Section; moreover, it does not bind Clark as he was not a party to it. See Carroll v. Carroll, 60 N. Y., 121, 124, which was an action for the admeasurement of dower, but which decided this principle.

The notes sued on by Clarke were decided by the State Court to be an honest and valid debt. (Rec. 28).

III.

There is no merit in the respondent's contention that under Section 67, subdivision "f" the judgment is "void" and that consequently restitution by the Sheriff must be ordered as in the case of a judgment reversed on appeal. The judgment is valid and unaffected by the bankruptcy proceedings.

In re Pease, 4 Am. Bky. Rep., 547.

For example, if a bankrupt were to be refused his discharge and should afterwards acquire property, there can be no doubt but that all judgments existing against him at the date of the filing of the petition in bankruptcy, though recovered within four months prior to that time, could be enforced by execution, as against such after acquired property. It is only the *lien* of the judgment that becomes void. The nullification of the lien alone is effected by the adjudication in bankruptcy, and we again assert that in order that that effect should be produced the lien must be in existence at the time of the adjudication and must not have become *functus officio* by a previous sale.

Peck v. Carroll, 6 Am. Bky. Rep., 93, 95, 96.

Respectfully submitted,

S. LIVINGSTON SAMUELS,
Counsel for Edward Howard Clarke, Petitioner.

FILE COPY.

FILED
DEC 12 1902
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 51.

EDWARD H. CLARKE,

Petitioner,

vs.

WILBUR LARREMORE, Trustee in Bankruptcy of RAYMOND W. KENNEY,

Bankrupt.

ADDITIONAL BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

S. LIVINGSTON SAMUELS,
Counsel for Edward H. Clarke,
Petitioner.

APPEAL PRINTING CO., 14-16 VESEY STREET.

In the Supreme Court of the United States.

OCTOBER TERM 1902.

EDWARD H. CLARKE, Petitioner, against WILBUR LARREMORE, Trustee in Bankruptcy of Raymond W. Kenney, Bankrupt.	No. 51

Additional Brief for Petitioner.

I.

The question as to whether under the evidence the judgment and execution of Clarke constituted an illegal preference is no longer presented in this cause. During the argument of the case, the counsel for the trustee stated in open court that he did not rely upon that point and would abandon it.

That concession includes the question whether Clarke's execution sale, from the fact of its being the one which formed the basis of the adjudication of bankruptcy under Section 3, Subdivision "a," Clause (3) of

the Bankruptcy Law, was thereby decided to be a preference under Section 30 Subdivisions "a" and "b." Clarke was not a party to the adjudication of bankruptcy and was not bound by it, and was at liberty to controvert any fact which it decided as to the preferential character of his judgment, execution and sale (Reed v. McIntyre, 98 U. S., 507, 512). By reason, however, of the concession above mentioned, we are not obliged to go into that question, and the only one in the case therefore, is as to the proper construction of Section 67, Subdivision "f."

II.

The argument of the trustee on that point is based upon the general language in the first part of the Subdivision to the effect that "*all* levies" etc., obtained within the specified time are to be deemed null and void; but this language is to be qualified by the rest of the sentence in which it occurs. The context shows that Congress did not have in mind the abstract idea of levies and other like liens, generally but the concrete idea of a specific piece of property, while affected by such a lien, being brought before the Bankruptcy Court for the purposes of administration in a bankruptcy proceeding. This is shown by the use of the words "deemed," "court" and "purposes of the section." "Deem" when used in a statute means to "adjudge." (Blaufus v. People, 69 N. Y., 107, 111; State v. Price, 11 N. J. L., 203, 218). Instances of this meaning of the word afforded by Sec. 60, Subdivision "a," and the last sentence of Sec. 67, Subdivision "e."

"Court" in Subdivision "f" means, the Court of

Bankruptcy in which the proceedings are pending and may include the referee. Section 1, Definition 7.

"Purposes of the section" evidently refers to the intention expressed in Subdivision "f" of passing title to the property there mentioned to the trustee, freed from the lien, or, in the discretion of the "Court," the lien itself, so that it may be enforced by a sale for the benefit of the estate.

The words which we have defined show that the Legislature, had in mind the idea of specific property encumbered by a levy or other lien coming before the Bankruptcy Court to be administered upon. The Court is then to hear evidence as to whether the property belongs to the bankrupt, whether the lien was obtained within the specified time, whether the bankrupt was insolvent when it was obtained, and whether there has been an adjudication of bankruptcy. If these matters are made clear the Court of Bankruptcy is then to "deem," that is, adjudge, that the lien is null and void, and that the property shall pass to the trustee, free from the lien, as a part of the bankrupt's estate. The Court may, however, in its discretion, order that "the right under the levy," which means the privilege of enforcing it, shall be "preserved," instead of being rendered null and void and shall pass to the trustee, and thereupon the Court may order such conveyance as may be necessary to carry the purposes of the section into effect. Those purposes are to dispose of the "property affected by the levy" or other lien, for the best interests of the estate, in either of the methods prescribed by the section. If there is no "property affected by a lien" before the Court for administration there is nothing to call its judicial powers into action un-

der Subdivision "f". There is then, no property to pass to the trustee, and no lien to be adjudged null and void on the one hand or ordered to be preserved on the other.

If we omit the general language at the beginning of Subdivision "f" and transpose the words contained in it there can be no doubt as to its true meaning.

The Subdivision will then read substantially as follows:

"Whenever property of a person is affected by a levy or other lien obtained through legal proceedings against him while insolvent within four months prior to the filing of a petition in bankruptcy against him, such lien shall be deemed null and void in case he is adjudged a bankrupt and the property shall be deemed," etc. Dealing with this concrete idea of certain specific property, affected by a lien, which is what Congress had in view, it is easy to see that Sec. 67, Subdivision "f," does not refer to the case of money realized by a sale under execution prior to the bankruptcy proceedings, whether it be in the hands of the creditor or of the sheriff, because in that case there is neither property nor lien to be disposed of by the Bankruptcy Court.

We think that Subdivision "f" has substantially the same meaning as Subdivision "c" of the same section, with the exception of clauses (1), (2) and (3). That speaks of "a lien" being "dissolved" by the adjudication, and provides for the same discretionary action by the Court with regard to preserving the lien. It clearly refers to an existing lien and not to one already extinguished by a sale for it is a solecism to speak of the latter as being liable to be dissolved.

III.

The foregoing construction of Subdivision "f" is justified by principles well settled in the interpretation of statutes.

In Atkins v. The Disintegrating Co., 18 Wall, 272, 302, the Court says:

"The general language found in one place may be restricted in its effect to the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intent of the enactment:" citing Brewer v. Blougher, 14 Peters, 198, 199; Miller v. Salomons, 7 Exchequer, 546; same case, on error, 8 *id.*, 778; Wambaugh v. Middleton, *ib.*, 356, 357.

In the construction of statutes the general words in one clause may be restrained by the particular words in a subsequent clause of the same statute. City of Covington, v. McNickle, 18 B. Mon., 262, 286.,

In construing statutes, the inquiry is, not as to the abstract force of the words used, but in what sense the Legislature intended to use them; and this sense is to be collected from the context; and a *narrower* or more extended meaning will be given according to the intention thus indicated.

McIntyre v. Ingraham, 35 Miss., 25.

In conformity to the foregoing principles of construction the words "all levies" etc. may be restricted to the levies and other liens mentioned later on in Subdivision "f" viz.: those existing at the date of the adjudication. The word "all" is frequently contracted in meaning in this manner in construing statutes.

The word "all" is frequently to be restrained

in an Act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the Legislature.

Phillips v. The State, 15 Ga., 518, 520.

In Acts of Assembly as well as in common parlance the word "all" is a general, rather than a universal term, and is to be understood in one sense or the other, according to the demands of sound reason.

Stone v. Elliott, 11 Ohio St., 252, 258.
Kieffer v. Ehler, 18 Pa. St., 388, 391.

The propriety of thus narrowing the meaning of the words "all levies," is shown by the fact that to give them the universal signification claimed by the Trustee would result in the injustice of depriving an innocent creditor of the benefit of a payment of his debt obtained through legal remedies long before the inception of proceedings in bankruptcy. Such payments have been always protected in the bankruptcy systems of this country or England.

"Where a particular construction of a statute "will occasion great inconvenience or produce in-"equality or *injustice* that view is to be avoided "if another and more reasonable interpretation is "present in the statute." Knowlton v. Moore, 178 U. S., 41, 47.

S. LIVINGSTON SAMUELS,
Counsel for Petitioner,
EDWARD H. CLARKE.

No. 883

FILED
MAR 11 1901
JAMES H. MCKENNEY

In the Supreme Court of the United States.

Brief of Spencer for Respondent

In the Matter

Filed Mar. 11, 1901.

of

The petition of EDWARD H. CLARKE for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

MEMORANDUM

ON BEHALF OF WILBUR LARREMORE, TRUSTEE.

NELSON S. SPENCER,
of Counsel.

LIVINGSTON MIDDLETON CO., 49 BEEKMAN ST., N. Y.

No. 262.

In the Supreme Court of the United States,

OCTOBER TERM 1901.

No. 262.

EDWARD H. CLARKE, *Petitioner*,

against

WILBUR LARREMORE, Trustee in Bankruptcy of RAYMOND W. KENNEY, Bankrupt, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF

FOR WILBUR LARREMORE, TRUSTEE, RESPONDENT.

NELSON S. SPENCER,
Of Counsel for the Trustee.

LIVINGSTON MIDDLEBROOK CO., 55 DUANE ST., N. Y.

In the Supreme Court of the United States.

EDWARD H. CLARKE,
Petitioner,

AGAINST

WILBUR LARREMORE, Trustee in bankruptcy of RAYMOND W. KENNEY, Bankrupt,
Respondent.

October Term, 1901.

No. 262.

Brief for Wilbur Larremore, Trustee, Respondent.

This record comes here in pursuance of a writ of *certiorari* issued to the United States Circuit Court of Appeals, for the Second Circuit (180 U. S., 640). The Circuit Court reviewed an order of the District Court of the United States, for the Southern District of New York, made on the 25th day of November, 1899 (Record, p. 62), which preserved for the benefit of the bankrupt's estate so much of the right under a judgment obtained by Edward Howard Clarke, the petitioner, against the bankrupt and under the levy made by the Sheriff of the County of New York in the State of New York, in pursuance of an execution issued to him on said judgment, as was represented by the proceeds of a sale made by said Sheriff under said execu-

tion, and which directed that the same pass to the trustee of the bankrupt for the benefit of the estate, and further directed that the said Sheriff pay and transfer to the trustee the amount of said proceeds and that all claims of Clarke to such proceeds be deemed transferred and conveyed to the trustee.

This order was made under the authority of and in accordance with the provisions of §67f of the Bankrupt Act.

The Circuit Court of Appeals also reviewed an order of said District Court made on the 21st day of July, 1899 (Record, p. 34), enjoining the said Sheriff from paying over the proceeds of said sale to the petitioner or to any other person than the trustee of the bankrupt, until the further order of the Court in the premises. This order was preliminary to the order of November 25th, 1899. No error is assigned in the making of this order which is not also involved in the making of the order of November 25th, 1899.

Statement of the Case.

On the 13th day of April, 1899, certain creditors of Raymond W. Kenney, then doing business in the City of New York as a fur merchant, filed a petition in the District Court of the United States for the Southern District of New York, praying that he be adjudged a bankrupt upon the ground that he, being insolvent, had committed an act of bankruptcy in suffering Edward Howard Clarke, within four months prior thereto, namely, on the 6th day of March, 1899, to obtain a judgment against him in the Supreme Court of the State of New York for the sum of $20,906.66 (Record, p. 10). It appeared from said petition and in later proceedings that an execution had been issued on said judgment to the Sheriff of the County of New York, and that a levy had been made

by the Sheriff thereunder on Kenney's stock in trade, in pursuance of which the Sheriff had sold the property on which he had levied on the 15th day of March, 1899, and realized therefrom the sum of $12,451.09. This sum the Sheriff then held. On this petition a subpœna was issued returnable on the 20th day of April, 1899 (Record, p. 12).

On the same day on which the petition was filed, namely, the 13th day of April, 1899, upon affidavits showing among other things the facts relative to the entry of Clarke's judgment, the District Court made an order requiring Kenney, the Sheriff and Clarke to show cause on the 18th day of April, 1899, why the Sheriff should not be enjoined from paying over to Clarke any of the proceeds of the sale made by the Sheriff under the execution and enjoining him from doing so until the hearing upon such order (Record, pp. 13-21).

This motion and the petition in bankruptcy were heard together. Messrs. Horwitz & Samuels, Mr. Clarke's present counsel, appeared for Kenney, and interposed an answer to the petition (Record, p. 22). The issue raised thereby was tried before the Court. From the testimony then taken it appeared, among other things, that Clarke was Kenney's father-in-law (Record, p. 24); that Clarke's action was brought upon certain promissory notes made by Kenney to his wife in 1894, but which had been in the latter's possession from that time until June, 1898, when he took them from his safe and gave them to his wife; that between March 4th and 6th, 1899, he had assigned about $8,000 of his accounts receivable to Clarke; that on the sale under the execution goods had been bid in on Kenney's behalf at about one-third of their real value (Record, p. 26), and it appeared in the testimony before the Referee, to which reference will presently be made, that these goods subsequently found their way to Mr. Kenney's new business in which Clarke was a partner (Record, p. 58).

Mr. Kenney subsequently withdrew his objections to being adjudicated a bankrupt and he was thereupon and

on the 12th day of July, 1899, duly adjudicated a bankrupt (Record, p. 22).

On the 20th day of July, 1899, the District Court made an order (Record, p. 34) upon and reciting the petition that Kenney be adjudicated a bankrupt, the order to show cause of April 13th, 1899, the trial of the issue of bankruptcy, the adjudication of bankruptcy, proof submitted by Clarke in opposition, the default of the Sheriff, and after hearing Clarke's counsel, which continued the injunction against the Sheriff and Clarke and directed the Sheriff to pay over the sum realized on the execution sale under Clarke's judgment to the Trustee of the bankrupt when appointed. As all the parties were before the Court, this order was in itself an adjudication that Clarke's judgment was a preference and an act of bankruptcy within the provisions of the bankrupt law.

On the 26th day of September, 1899, Mr. Wilbur Larremore was elected trustee in bankruptcy.

Upon the bankrupt's examination before the Referee it appeared, among other things (Record, pp. 57-61), that Mr. Clarke is his wife's father, that he lives at Rockland, Maine, but always stays with the bankrupt when in the City of New York; that Messrs. Horwitz and Samuels are the bankrupt's attorneys; that Mr. George Bell, who acted for Clarke in procuring the judgment against Kenney, had been and was the bankrupt's attorney in other proceedings then pending. That the notes on which the judgment was procured were notes held by his wife and represented a loan by her to him in 1894, on which he had never paid any interest or anything on account of the principal; that these notes were transferred by her to Clarke, who brought suit against him; that he assigned to Clarke accounts amounting to $7,000, for which there was no consideration except the notes represented by the judgment; that on the Sheriff's sale under the execution he assisted one Wagner in buying goods worth $15,000 for $5,000, which were subsequently sold in part to a firm known as "Kenney," formed in June, 1899, to carry on the fur business,

composed of Clarke and one W. W. Hart, which employs the bankrupt; that Clarke was never before in the fur business, has contributed $1,500 in capital of the firm, and never comes into the store, but has given the bankrupt his power of attorney to do anything for him; and that the bankrupt has no interest in the business, but nevertheless made the arrangements for organizing it and manages it.

Upon the petition of the trustee (Record, p. 37) the District Court made an order (Record, p. 62) based upon all the proceedings before the Court and the Referee, specifically reciting them and including the testimony taken, which directed that "so much of the right under the judgment obtained by said Edward Howard Clarke against said Raymond W. Kenney for the sum of $20,906.66 on the 6th day of March, 1899, in the Supreme Court of the State of New York, and the levy made by the said Thomas J. Dunn, Sheriff of the County of New York, under the execution issued to him upon the said judgment, as is represented by the proceeds of the sale made by said Sheriff under said execution, be and it is hereby preserved for the benefit of the estate of the said Raymond W. Kenney, bankrupt, and that the same pass to and shall be preserved by Wilbur Larremore, Esq., trustee, for the benefit of said estate;" and that the sheriff transfer the said sum of money to said Trustee and that all claims of Clarke to said sum of money under said judgment, execution or levy be deemed transferred and conveyed to the trustee. This order was made after hearing Clarke, Kenney, the sheriff and the petitioning creditors. As all parties were before the Court, this order was again an adjudication upon the merits, including among other things, the fact that Clarke's judgment was a preference and an act of bankruptcy within the provisions of the bankrupt law.

Mr. Clarke alone presented a petition to the Circuit Court of Appeals to review this order and incidentally the order of July 20th, 1899. The sheriff did not join him but remained satisfied with the disposition of the

matter made by the District Court. No question of jurisdiction is involved, not only because it can only be raised by the sheriff, who is not here to raise it, and because it is not assigned as a ground of error, but also because Mr. Clarke's counsel, on the argument before the Circuit Court of Appeals, expressly waived it. (Record, p. 77.)

The Circuit Court has affirmed the orders and this writ of *certiorari* is to review their determination. The opinions rendered by the District Court at the time of making the orders reviewed and by the Circuit Court of Appeals upon their affirmance appear in the Record at pp. 65, 66 and 72 respectively.

The single ground of error on this record assigned by the petitioner isthat the proceeds of the execution sale in the sheriff's hands have become the property of Clarke and have ceased to be that of the bankrupt and therefore are not subject to the provisions of the bankrupt law in pursuance of which the orders were made.

ARGUMENT.

I.

The Trustee is entitled to the proceeds of sale under §67f of the Bankrupt Act.

That section is as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Inasmuch as Mr. Kenney was adjudicated a bankrupt, Mr. Clarke's judgment against him and the levy of the Sheriff thereunder became, by the operation of this section, null and void. On this point there is no controversy. The property *affected* by the judgment and levy also became, by the provisions of the section, wholly discharged and released therefrom, unless the Court otherwise ordered. If it were necessary to

rely upon it, this provision of the statute is in itself sufficient for the purposes of the trustee. For the property *affected* by the judgment and levy is not necessarily the property of the bankrupt (the section does not mention *his* property), but is equally the property, the money, in the hands of the Sheriff.

But the Court may also, as it has here done, order that *the right under the judgment* and levy shall be preserved for the benefit of the estate. The right preserved is any right, including the lienor's or judgment creditor's right, and that is passed to the trustee. The Court is further authorized to order such conveyance—that is, in this case, necessarily, a conveyance of the judgment creditor's right—as may be necessary to carry the section into effect. The Court has, consequently, ordered that Clarke's claims under his judgment, execution or levy be deemed transferred and conveyed to the trustee.

The objections urged on behalf of the petitioner to this plain reading of the statute touch very lightly on the essential and determining point. That point is, briefly stated, that the petitioner's rights fall with his judgment. We may easily concede that the money in the Sheriff's hands is and was at the time of the adjudication of bankruptcy *prima facie* the property of Mr. Clarke. It is true, if Mr. Clarke have a valid judgment. But the judgment has been rendered void. He recovered his judgment subject to the operation of the bankrupt act and the provisions of that act must be read into his judgment contract.

Mather v. *Brush*, 16 Johns., 233.
Walker v. *Whitehead*, 16 Wall., 314.
Barnitz v. *Beverly*, 163 U. S., 118, 123, 124.
Bronson v. *Kinzie*, 1 How., 311, 319.

A void judgment may be such *ab initio*, in which case all acts performed under it and all claims growing out of it are also void and it may be wholly disregarded. (Freeman on Judgments, 4th Ed., §117), or it may be

such because of a fact subsequent or of error. Such a fact subsequent as to a judgment recovered within the four months period is the adjudication of bankruptcy under the Bankrupt Act. The legal situation is the same as if the judgment had been reversed for error. The judgment is as if it had never been made. But while it is unreversed it is valid and a protection to the Sheriff. A *bona fide* purchaser on a sale made by its authority is protected but the proceeds must be restored to the judgment debtor or to any one who has succeeded to his rights.

The Bank of the United States v. *The Bank of Washington*, 6 Pet., 8.
Northwestern Fuel Co. v. *Brock*, 139 U. S., 216.

In the latter case Judge Field says: "The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question there has been as to the proceedings to enforce the restitution." After quoting the *United States Bank* v. *Bank of Washington*, he proceeds: "We are of the opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the Court, and that all needed inquiry can be had to guide its judgment in a summary proceeding, the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed."

In *Haebler* v. *Myers*, 132 N. Y., 363, the facts were that by virtue of a levy under an attachment procured by the plaintiff, the Sheriff received $900. The defendants as subsequent lienors moved to vacate the attachment and succeeded. The Sheriff thereupon paid the $900 to the defendants. On appeal the order vacating the attachment was reversed. Pending the appeal the plaintiffs recovered a judgment in their suit and issued an execution which was returned unsatisfied. They then sought to recover from the defendants the amount paid the

latter by the Sheriff. The Court say: "While the erroneous order was a protection to the Sheriff, who acted upon it while it was in force, it is no protection to the defendants, because it was subsequently reversed on appeal and *became, as to them, the same as if it had never been made.* When they accepted the money that was paid over in consequence of the order that they procured, they knew that if the order should be reversed and their motion denied, they would no longer be entitled to it, and could not in fairness retain it. They also knew that if, in the meantime, the plaintiffs perfected judgment and issued execution, their right to the money, if not paid over, would be complete upon a reversal of the order. As they acted with knowledge of all the facts, it would be inequitable for them to retain money received under such circumstances, and we see no reason why the law should not infer a promise of restitution *the same as if the money had been collected under an execution.* In either case the inference rests upon the fact that money was received by those who knew at the time that it might ultimately be decided that they were not entitled to it. But to whom did the implied promise run? Obviously to those who would have been entitled to the money upon the reversal of the order, provided it had not been paid to the defendants."

So, here, Mr. Clarke knew that his judgment was subject to be defeated by the filing of a petition in bankruptcy within four months from the date of its recovery followed by an adjudication. It is not necessary that the act rendering the judgment void should relate back to the time of filing the petition except in the same way that the reversal of an erroneous judgment relates back. The Sheriff and *bona fide* purchasers are protected for acts done under it and the proceeds of a sale of the goods take the place of the goods.

This plainly appears in the case of *Conner v. Long*, 104 U. S., 228, where, under the Act of 1867, the dissolution of an attachment lien was considered. By that act the assignment from the register to the assignee did relate back to the commencement

of the proceedings in bankruptcy. The Court held that the title of the bankrupt was defeasible and when the petition is made it is devested as of the date when the petition is filed. It was argued that when the attachment proceedings had resulted in a disposition of the property prior to the actual conveyance to the assignee the title would not pass to him. That is, in substance, the argument here made. The Court, however, held otherwise, and that it is the title to property subject to an attachment only when levied within four months next preceding the commencement of the bankruptcy proceedings, which becomes vested in the assignee by relation, the same attachment being thereby dissolved as of that date. It then says: "One consequence is, that if property of the debtor, levied on under such an attachment, has been sold prior to the filing of the petition in bankruptcy, but thereafter the proceeds of the sale remain in the hands of the Sheriff, or *before the assignment have been applied to the payment of the judgment in the attachment suit, the rights of the assignee attach to the money and cannot follow the property sold;* for the latter not being subject to the attachment at the commencement of the bankruptcy proceedings, the title thereto is not thereby transferred to the assignee; but the attachment being dissolved upon that event, *the right to the proceeds of the sale passes* under the assignment, released from the claims of all parties to the attachment suit, as of the date of the commencement of the proceedings in bankruptcy. And in such a case the plaintiff in the attachment suit, *having received the proceeds of the sale on his judgment*, would be liable to an action by the assignee for that sum of money had and received to his use; or, *if it remained in the hands of the Sheriff*, the assignee might become a party to the action, and *obtain an order of the Court requiring the amount to be paid directly to himself.*"

The Court in this case was considering not only the case of an attachment, but also of an execution, and its language therefore expressly applies to this case.

Although the language of the present Statute makes the judgment in terms void, it relieves the court of any doubt as to the result of the avoidance by providing

specifically that "nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry." In other words, the judgment is made void precisely as a judgment for error is made void—*bona fide* purchasers are protected, and the proceeds of the sale take the place of the bankrupt's property. But the judgment creditor's right to those proceeds ceases; he is required to surrender his claim thereto, and the trustee is vested therewith. The trustee occupies the place which the judgment debtor would otherwise have occupied upon the determination that the judgment is void. The scheme is consistent and complete.

II.

The argument for the petitioner.

The argument of the petitioner's counsel is subtle and elusive. The major part of his propositions of law may be safely admitted in the abstract, but their applicability to the case in hand is not always apparent.

I.—It is not true that because the proceeds of an execution sale are the property of the judgment creditor, and not of the judgment debtor, it can be assumed that Congress intended to make the judgment void only where property levied upon had not been sold. The contrary intention is apparent from a reasonable consideration of the entire section.

He is in error in saying (p. 6) that Congress authorized the preservation of the *lien*. It is the *right under the judgment* which may be so preserved. The judgment is void, but, as the property may have been sold to a *bona fide* purchaser, the right, under the judgment, whatever it may be, is preserved and passed to the trustee.

It is unimportant that the section does not in terms specify an execution. If it were important, it would be included under "other liens," which are specified. The judgment is the essential thing, and that is made null and void.

It may be conceded that the act vests title in the trustee as of the date of the adjudication. But the same fact of adjudication makes Clarke's judgment void, and the bankrupt, or the trustee who succeeds to his rights, thereupon becomes entitled to the return of the property affected by it or its proceeds.

II.—It is not worth while to discuss the English Bankruptcy Act, for it is wholly dissimilar from the Act of 1898. The Act of 1898 must be construed strictly according to its terms.

Wilson v. *Nelson*, 183 U. S., 191.

It is sufficient to say that the English Act does not make the judgment, or in its case the execution, void, as does the Act of 1898.

III.—It is not material to consider whether the words "null and void" in §67f relate back from the time of adjudication. The judgment simply becomes as if it had never existed. But it is not necessary to hold that thereby the Sheriff becomes a trespasser, any more than it is necessary to hold that the title of a *bona fide* purchaser is affected. Neither of those facts follow from a void judgment which had a legal inception. The rights of the judgment creditor only are wiped out unless the Court orders their preservation for the benefit of the estate. Nor does any retroactive construction make §67f conflict with §60. §67f is simply additional to §60. It was an addition made by the Senate to the bill as passed by the House of Representatives and is to be considered as conferring a further right upon the trustee (*In re Richards*, 96 Fed. Rep., 935). Under either section the ultimate result is the same. For, under §60a, the

judgment is a preference (*Wilson* v. *Nelson,* 183 U. S., 191), and it has been here so adjudicated by the District Court. Under §60b it is "voidable by the trustee and he may recover the property or its value from" Clarke. The trustee is, therefore, even without the aid of §67f, entitled to the sum in question. §67f goes further and makes the judgment not only voidable but void irrespective of any intent on the part of the debtor or the creditor.

The petitioner's counsel is in error in saying that no remedy is given to the trustee to recover the fund in question. By the terms of the section the right under the judgment passes to the trustee, and the Court may order such conveyance as shall be necessary to carry the provisions of the section into effect. Further authority is found in §2, sub-divisions 7, 13 and 15.

IV.—The right preserved by §67f is any right, either of the debtor or the creditor. The particular right is not specified. It is the right to the proceeds of sale.

V.—The proviso of the section was evidently inserted to indicate the nature of the fact of avoidance. Otherwise it might be open to argument, whether or not the judgment was so much avoided *ab initio* as to wipe out intervening rights of innocent parties. It is immaterial from this point of view whether the sale was before or after an adjudication. It would be a strained construction of the statute to hold that it applied only to sales after the adjudication.

VI.—We may adopt the quotation of the petitioner's counsel (p. 54) from *Clarke* v. *Iselin,* 21 Wall., 360, 377, as strictly applicable to this case and add to it the remarks of this Court in *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S., 438: "It is hardly necessary to assert that the object of a bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt—not among some of the creditors, but among all of them.

Such object could not be secured if there were no provisions against preferences—no provisions for defeating their purpose. * * * Undoubtedly all of the sections of the act must be construed together as means to effect its purpose, and some of its sections are closely related. It does not follow, however, that each section should not be given the meaning its language conveys, if clear and consistent."

In this case, if Mr. Clarke's contention is correct, he will receive the entire estate and the remaining creditors will receive nothing.

III.

The decree of the United States Circuit Court of Appeals should be affirmed with costs.

NELSON S. SPENCER,
Of Counsel for Wilbur Larremore,
Trustee.

In the Supreme Court of the United States.

EDWARD H. CLARKE, Petitioner, AGAINST. WILBUR LARREMORE, trustee in bankruptcy of RAYMOND W. KENNEY, bankrupt, Respondent.	October Term 1902, No 51.

Supplemental Brief for Wilbur Larremore, Trustee, Respondent.

This brief is filed in pursuance of the order of the Court made on the 17th day of November, 1902, restoring the case to the docket with leave to counsel to submit it to a full bench on or before December 15th, 1902, on the briefs then on file and on such additional briefs as counsel may desire to file.

Since the argument in this case, the Court, in the case of *Metcalf* v. *Barker* (decision rendered December 1, 1902), has construed §67f of the bankrupt law. In the opinion given in that case, the Court say, after reciting the provisions of the section in question:

"In our opinion the conclusion to be drawn "from this language is that it is the lien created by a "levy, or a judgment, or an attachment, or otherwise, "that is invalidated, and that where the lien is obtained "more than four months prior to the filing of the pe- "tition, it is not only not to be deemed null and void on

"adjudication, but its validity is recognized. When it "is obtained within four months the property is dis- "charged therefrom, but not otherwise. A judgment "or decree in enforcement of an otherwise valid pre- "existing lien is not *the judgment denounced by the "statute, which is plainly confined to judgments creat- "ing liens.* If this were not so the date of the ac- "quisition of a lien by attachment or creditors' bill "would be entirely immaterial. Moreover other pro- "visions of the act render it unreasonable to impute "the intention to annul *all* judgments recovered within "four months."

This language is, of course, applicable to the circumstances of the case before the Court, and does not extend to the circumstances of this case. But it is in sympathy with our contention that it is the judgment and not the lien of the judgment (as the petitioner's counsel urges) which is avoided by the statute. Such is the plain wording of the statute. It is intended to meet a situation of the kind which is the basis of this proceeding. Nor is the quoted language of the Court to be construed too strictly. Technically speaking, judgments do not create liens, except on real estate—the lien arises on the issuance of an execution. It is the judgment establishing the right from which the lien follows of course, which is avoided. In this sense the judgment creates the lien, and it is the sense, we submit, which the act intends. Of the three particular words chosen by Congress, "levies, judgments, attachments," only the latter creates a lien. There is no lien created by a levy. And yet there is no doubt, we submit, as to what was intended by Congress. It intended that any preference obtained through legal proceedings within four months of the filing of a petition in bankruptcy should be rendered void, if an adjudication followed. As a creditor could obtain no title to or right in the bankrupt's property superior to the right of the trustee except through the prior intervention of a lien, such liens and the proceedings which created them were declared void. The trustee's priority was thus made certain. Congress took

pains to make this quite plain by providing further that the Court might order that *"the right under such* levy, *judgment,* attachment or other lien"—not the *lien itself* —should be preserved for the benefit of the estate. This clause would be substantially unnecessary except in a case such as this. If the bankrupt's property be not sold, if the title be still in him, subject to the lien, the trustee takes it free of the lien and his title is quite as good and usable for any purpose, if not better, than that of the lienor, to whose place he might be substituted. But where, as here, the property has been sold and the rights of *bona fide* purchasers have intervened, the preservation of the rights of the judgment creditor, under the judgment, to the proceeds of the sale for the benefit of the estate, becomes highly important.

In every proper sense, the judgment in this case was one creating a lien, and, if not, the execution issued upon it did so. The lien of an execution is avoided as well as the lien of a judgment. To maintain his claim to the money in question, the petitioner must show a title. One of the links in the chain of title is the lien either of a judgment or execution. If that be avoided, his title fails.

The result, if the contention of the petitioner's counsel should be sustained, would be most anomalous. For example, let us say that a creditor attaches a debtor's property within the four months' period in an action to which the debtor has interposed an answer. A second creditor, such as Clarke, subsequently commences an action, procures a judgment, issues execution and the property is sold by the Sheriff. The proceeds of sale in the hands of the Sheriff are nevertheless subject to the lien of the attachment. A petition in bankruptcy is then filed, followed by an adjudication. If the petitioner's counsel be correct, as between themselves and the trustee, the attaching creditor has no rights, because his lien was in existence at the time of the filing of the petition and was avoided by the bankruptcy act, while the judgment creditor's rights are preserved and he acquires the property, because the proceeds of sale are not subject to any lien and there is no lien to be avoided by the bankruptcy act. The creditor who is inferior in diligence,

and not unlikely to be in collusion with the debtor, would thus acquire an unjust preference over his superior in diligence, and over the trustee as well. It is surely a strained construction of the statute which would permit this.

NELSON S. SPENCER,
Of Counsel for Wilbur
Larremore, Trustee.

Supreme Court of the United States.

No. 51.—October Term, 1902.

Edward H. Clarke, Petitioner, *vs.* Wilbur Larremore, Trustee in Bankruptcy of Raymond W. Kenney, Bankrupt.	On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 23, 1903.]

On January 23, 1899, the petitioner, the owner of certain notes of Raymond W. Kenney, commenced an action thereon in the Supreme Court of the State of New York. On March 6, 1899, he recovered judgment for the sum of $20,906.66. An execution, issued thereon, was by the sheriff of the county of New York levied upon a stock of goods and fixtures belonging to Kenney. A sheriff's sale thereof, had on March 15, 1899, realized $12,451.09. Shortly after the levy of the execution Leon Abbett sued out in the same court a writ of attachment against the property of Kenney, and caused it to be levied upon the same stock and fixtures. Immediately thereafter, claiming that the debt in judgment was a fraudulent one, he commenced in aid of his attachment an injunction suit to prevent the further enforcement of the judgment, and obtained a temporary order restraining the sheriff from paying petitioner the money received upon the execution sale. Upon a hearing the Supreme Court decided that the debt was just and honest, and on April 13, 1899, set aside the restraining order. On the same day, and before the sheriff had returned the execution or paid the money collected on it, a petition in involuntary bankruptcy against Kenney was filed in the United States District Court for the Southern District of New York, and an order made by the district judge restraining the sheriff from paying the money to Clarke, the execution creditor. (95 Fed. Rep. 427.) Kenney was thereafter adjudged a bankrupt, and on November 25, 1899, the plaintiff having been appointed trustee in bankruptcy, the district judge entered a further order directing the sheriff to pay the money to the trustee. (97 Fed. Rep. 555.) On review the United States Circuit Court of Appeals for the Second Circuit affirmed these orders of the district judge, (105 Fed. Rep. 897,) and thereupon a certiorari was granted by this court. (180 U. S. 640.)

Section 67, subdivision "f," of the bankrupt act of 1898, (30 Stat. 544, 565,) reads:

"That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him,

shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Mr. Justice BREWER delivered the opinion of the Court.

The contention of the petitioner is that—

"The sheriff having sold the goods levied on before the filing of the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt, at the time of the adjudication, and the trustee, therefore, has no title to the same."

This contention cannot be sustained. The judgment in favor of petitioner against Kenney was not like that in *Metcalf* v. *Barker*, (187 U.S. ——,) one giving effect to a lien theretofore existing, but one which with the levy of an execution issued thereon created the lien; and as judgment, execution and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication of bankruptcy. This nullity and invalidity relate back to the time of the entry of the judgment and affect that and all subsequent proceedings. The language of the statute is not "when" but "in case he is adjudged a bankrupt," and the lien obtained through these legal proceedings was by the adjudication rendered null and void from its inception. Further, the statute provides that "the property affected by"—not the property subject to—the lien is wholly discharged and released therefrom. It is true that the stock and fixtures, the property originally belonging to the bankrupt, had been sold, but having, so far as the record shows, passed to a "*bona fide* purchaser for value," it remained by virtue of the last clause of the section the property of the purchaser, unaffected by the bankruptcy proceedings. But the money received by the sheriff took the place of that property.

It is said that that money was not the property of the bankrupt but of the creditor in the execution. Doubtless as between the judgment creditor and debtor, and while the execution remained in force, the money could not be considered the property of the debtor, and could not be appropriated to the payment of his debts as against the rights of the judgment creditor, but it had not become the property absolutely of the

creditor. The writ of execution had not been fully executed. Its command to the sheriff was to seize the property of the judgment debtor, sell it and pay the proceeds over to the creditor. The time within which that was to be done had not elapsed, and the execution was still in his hands not fully executed. The rights of the creditor were still subject to interception. Suppose, for instance, there being no bankruptcy proceedings, the judgment had been reversed by an appellate court and the mandate of reversal filed in the trial court, could it for a moment be claimed that, notwithstanding the reversal of the judgment the money in the hands of the sheriff belonged to the judgment creditor, and could be recovered by him, or that it was the duty of the sheriff to pay it to him? The purchaser at the sheriff's sale might keep possession of the property which he had purchased, but the money received as the proceeds of such sale would undoubtedly belong and be paid over to the judgment debtor. The bankruptcy proceedings operated in the same way. They took away the foundation upon which the rights of the creditor, obtained by judgment, execution, levy and sale, rested. The duty of the sheriff to pay the money over to the judgment creditor was gone and that money became the property of the bankrupt, and was subject to the control of his representative in bankruptcy.

It was held in *Turner* v. *Fendall*, (1 Cranch, 116,) that money collected by a sheriff on an execution could not be levied upon under execution placed in his hands against the judgment creditor, and that the latter could maintain an action against the sheriff for a failure to pay the money thus collected. A similar ruling was made in New York, (*Baker* v. *Kenworthy*, 41 N. Y. 215,) in which it appeared that a sheriff had collected money on an execution in favor of one Brooks; that he returned the execution without paying the money to Brooks, but on the contrary levied upon it under an execution against Brooks, and it was held that such levy did not release him from liability to Brooks. It was said in the opinion (p. 216):

"The money paid into the hands of the sheriff on the execution in favor of Brooks did not become the property of Brooks until it had been paid over to him. Until that was done, the sheriff could not levy upon it by virtue of the execution against Brooks then in his hands."

The rule in that State in respect to a levy upon money in the hands of a sheriff may have been changed—at least so far as an attachment is concerned. See *Wehle* v. *Conner*, (83 N. Y. 231.)

In *Nelson* v. *Kerr*, (59 N. Y. 224,) it is said: "The money collected by the sheriff belongs to the plaintiff." But in that case the execution had been returned, and yet the officer had not paid the money to the execution creditor. See also *Kingston Bank* v. *Eltinge*, (40 N. Y. 391.)

In none of those cases had anything been done to affect the validity or force of the writ of execution. Whatever was done was done under a writ

whose validity and potency were unchallenged and undisturbed, while here, before the writ of execution had been fully executed, its power was taken away. Its command had ceased to be obligatory upon the sheriff, and the execution creditor had no right to insist that the sheriff should further execute its commands.

A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution, and that which was done under them, as to justify a recovery by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend on many other considerations. It is enough now to hold that the bankruptcy proceedings seized upon the writ of execution while it was still unexecuted and released the property which was held under it from the claim of the execution creditor.

The judgment of the Court of Appeals is *Affirmed.*

Mr. Justice WHITE and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.